No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Maryland

JOINT APPENDIX
VOLUME V OF V (JA1164 – JA1351)

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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

O. JOHN BENISEK, ET AL.,

Plaintiffs,

v.

LINDA H. LAMONE, *Administrator, Maryland State Board of Elections, et al.*,
Defendants.

No. 1:13-cv-03233-JKB

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208	06/22/2018	OPINION of US Supreme Court (certified copy) "Affirming" the judgment of the District Court as to 205 Notice of Appeal, filed by Alonnie L. Ropp, Jeremiah DeWolf, O. John Benisek, Edmund Cueman, Sharon Strine, Kat O'Connor and Charles W. Eyler
209	06/29/2018	STATUS REPORT by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine
210	07/13/2018	Supplemental to *Motion for Summary Judgment (Dkt. 177)* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit C–1, # 5 Exhibit C–2, # 6 Exhibit C–3, # 7 Exhibit C–4,

NO.	DATE	DESCRIPTION
		# 8 Exhibit C–5, # 9 Exhibit C–6, # 10 Exhibit C–7, # 11 Exhibit C–8, # 12 Exhibit C–9, # 13 Exhibit C–10, # 14 Exhibit C–11)
211	07/13/2018	Supplemental to 186 Cross MOTION for Summary Judgment *and Response in Opposition to Plaintiffs' Motion for Preliminary Injunction and, in the Alternative, for Summary Judgment*, 201 Reply to Response to Motion, filed by Linda H. Lamone, David J. McManus, Jr.
212	07/23/2018	ORDER of Supreme Court of the United States "Affirming" the District Court's order denying a preliminary injunction as to 205 Notice of Appeal, filed by Alonnie L. Ropp, Jeremiah DeWolf, O. John Benisek, Edmund Cueman, Sharon Strine, Kat O'Connor, Charles W. Eyler
213	08/30/2018	ORDER re: Setting Hearing. Signed by Chief Judge James K. Bredar on 8/29/2018
214	09/07/2018	ORDER LIFTING STAY. Signed by Chief Judge James K. Bredar on 9/7/2018

NO.	DATE	DESCRIPTION
215	09/11/2018	MOTION to Strike 210 Supplemental, *or Exclude Portions of the Declaration of Micah D. Stein* by Linda H. Lamone, David J. McManus, Jr. (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)
216	09/12/2018	PAPERLESS ORDER: Plaintiffs shall respond to Defendants' Motion to Exclude (etc.—refer to ECF 215) on or before September 24, 2018. Defendants' reply shall be filed on or before September 28, 2018. Signed by Chief Judge James K. Bredar on 9/12/2018
217	09/24/2018	RESPONSE in Opposition re 215 MOTION to Strike 210 Supplemental, *or Exclude Portions of the Declaration of Micah D. Stein* filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine. (Attachments: # 1 Exhibit A)
218	09/28/2018	REPLY to Response to Motion re 215 MOTION to Strike 210 Supplemental, *or Exclude Portions of the Declaration of Micah D. Stein* filed by Linda H.

NO.	DATE	DESCRIPTION
		Lamone, David J. McManus, Jr. (Attachments: # 1 Exhibit 1)
219	10/02/2018	ORDER denying 215 Defendants' Motion to Exclude Portions of the Declaration of Micah D. Stein; Judge Russell joins in the Order; and Judge Niemeyer would defer ruling until during the hearing on 10/4/18. Signed by Chief Judge James K. Bredar on 10/2/2018
220	10/04/2018	Three–Judge Court Hearing held on 10/4/2018 before Chief Judge James K. Bredar, Judge Paul V. Neimeyer and Judge George Levi Russell, III
221	10/19/2018	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 10/4/2018, before Judge James K. Bredar. Court Reporter Christine T. Asif, Telephone number 410–962–4492. Total number of pages filed: 126. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained from the Court Reporter or through PACER. Redaction

NO.	DATE	DESCRIPTION
		Request due 11/9/2018. Redacted Transcript Deadline set for 11/19/2018. Release of Transcript Restriction set for 1/17/2019
222	11/07/2018	MEMORANDUM OPINION
223	11/07/2018	JUDGMENT Granting plaintiffs' motion for summary judgment; Denying defendants' cross–motion for summary judgment. After the conclusion of the 2018 congressional election, the defendants are permanently enjoined from conducting any further election for members of the U.S. House of Representatives from Maryland under the 2011 plan and are directed to submit to the court a new congressional redistricting plan. In the event that the States [*sic*] does not submit a plan by the specified deadline or proposes a plan that is rejected, the court will give the redistricting task to a Congressional District Commission appointed by the court to produce and submit an appropriate plan by July 8, 2019, for approval by the court

NO.	DATE	DESCRIPTION
		The Commission shall consist of United States Magistrate Judge J. Mark Coulson, as chair, a person designated by the plaintiffs, and a person designated by the State. The Clerk shall assess the costs of this action against the State. Signed by Judge Paul V. Niemeyer, for the Court on 11/7/2018
224	11/13/2018	ORDER regarding Notice of Contemplated Appointment of Special Master; Directing in the event the State does not submit a compliant redistricting plan by the March 7, 2019 deadline, the Court hereby provides notice of its intent to designate the Commission's Chair, United States Magistrate Judge J. Mark Coulson, as a Special Master pursuant to Federal Rule of Procedure 53 and Local Rule 301(5)(c); No later than 15 days from the date of this Notice, the Special Master shall file the affidavit described in Rule 53(b)(3). Any party objecting to the appointment outlined in this Notice shall file such objection specifying the grounds no later than 30 days

NO.	DATE	DESCRIPTION
		from the date of this Notice. Signed by Chief Judge James K. Bredar on 11/13/2018
225	11/15/2018	NOTICE OF APPEAL as to 223 Judgment, 222 Memorandum Opinion by Linda H. Lamone, David J. McManus, Jr.
226	11/15/2018	Consent MOTION to Stay re 223 Judgment,,,, 222 Memorandum Opinion by Linda H. Lamone, David J. McManus, Jr. (Attachments: # 1 Text of Proposed Order)
227	11/15/2018	RESPONSE in Support re 226 Consent MOTION to Stay re 223 Judgment,,,, 222 Memorandum Opinion *(Plaintiffs' Statement of Conditional Consent to a Discretionary Stay Pending Appeal)* filed by O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Kat O'Connor, Alonnie L. Ropp, Sharon Strine
228	11/15/2018	SPECIAL MASTER DISCLOSURE Pursuant to Rule 53(b)(3)(A). Signed by Magistrate Judge J. Mark Coulson on 11/15/2018

* * *

NO.	DATE	DESCRIPTION
230	11/16/2018	ORDER granting in part 226 Consent Motion to Stay. The Judgment previously entered is Stayed until the United States Supreme Court decides the appeal of this case or until the passage of the date of July 1, 2019, whichever first occurs. Signed by Chief Judge James K. Bredar on 11/16/2018
		* * *
232	12/11/2018	Supreme Court of the United States Case Number 18–726 for 225 Notice of Appeal, filed by Linda H. Lamone and David J. McManus, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al. *Plaintiffs*, vs. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

JOINT STATUS REPORT

Pursuant to this Court's August 24, 2017 Order Entering Stay (Dkt. 204), the parties have met and conferred regarding further proceedings in this case. The parties' positions are set forth below.

I. SUPPLEMENTAL BRIEFS ON SUMMARY JUDGMENT

The plaintiffs have filed a motion for summary judgment, and the State has filed a cross-motion for summary judgment. The motions are fully briefed and ripe for decision (Dkts. 177, 186, 191, 201), and the plaintiffs will not move to reopen discovery.

The parties agree that supplemental summary judgment briefs are warranted to allow the parties to address *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the Supreme Court's disposition of the appeal in this case, and other subsequent relevant authority.

The parties agree to file simultaneous supplemental summary judgment briefs of 25 pages or less by or before **noon on Friday, July 13, 2018**.

II. PLAINTIFFS' POSITION REGARDING A TRIAL DATE

Plaintiffs respectfully submit that a trial date should be set at the earliest dates on which the judges of this Court are able to find overlapping time on their schedules, and in no event later than October 2018. This is so to ensure that plaintiffs' claims are not mooted by the passage of the 2020 elections.

To ensure that we are able to obtain a new congressional map in time for the 2020 elections if the Court enters a permanent injunction, there must be time for the Supreme Court to complete its appellate review of this Court's final judgment by January 2020 or earlier.[1] Working backward from there, the parties' jurisdictional briefs would have to be considered by the Supreme Court at one of its conferences in early April 2019 or before. Assuming that the parties complete their jurisdictional briefing over a significantly shortened 60-day period,[2] this Court would have to enter a

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[1] If this Court were to enter a permanent injunction in favor of the plaintiffs, we anticipate that the State would move the Supreme Court for a stay of the injunction. Although we would oppose such relief, there is a significant possibility that the Supreme Court would enter a stay, as it did in *Gill* and the North Carolina case, *Common Cause v. Rucho*, No. 17-1295.

[2] Supreme Court rules allow for 90 days for the appellants' jurisdictional brief, 30 days for the appellees' response, and

final judgment in early January 2019—just five months from now.[3] We are concerned that waiting to set a trial date until after a decision on the summary judgment motions would make meeting that timeline substantially more difficult.

We therefore respectfully submit that, to ensure that the Court has adequate time to issue a final judgment while leaving time for appellate review and an orderly enactment of a new map, a trial on the earliest possible dates—and in no event later than October 2018—is necessary. We anticipate needing two or three days for trial if the Court grants partial summary judgment on the issue of intent; and otherwise, three or four days.

III. DEFENDANTS' POSITION REGARDING A TRIAL DATE

Defendants continue to believe that this matter is appropriate for resolution on summary judgment. Defendants therefore believe that it is premature to set trial preparation or trial dates. To the extent any possibility of mootness now threatens plaintiffs' claims, it

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between 14 and 20 days for a reply brief depending on the Court's case distribution schedule—for an ordinary total of 134-140 days for jurisdictional briefing assuming no extensions.

[3] We do not mean to suggest that absent a final judgment from this Court by January 2019, plaintiffs' claims will necessarily be mooted. Our point is only that a final judgment by or before January 2019 is necessary to ensure an orderly conclusion to this litigation and to avoid an inequitable risk that plaintiffs' claim is mooted by passage of time.

is due to their own litigation conduct including decisions about when to file and when to seek preliminary injunction. As plaintiffs set forth above, significant questions regarding scheduling, such as how many days should be set aside for trial, may be substantially clarified through resolution of the cross-motions for summary judgment. Indeed, the case may not even proceed to trial at all. However, Defendants do not object to the setting of a trial date and appropriate pre-trial deadlines as soon as practicable after the resolution of the pending and contemplated dispositive motions and anticipate working cooperatively with Plaintiffs' counsel to set an expeditious schedule at the appropriate time.[4]

* * *

[4] Due to pre-planned family vacations, Defendants' counsel are not available during the weeks beginning August 20 and August 27.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al., *Plaintiffs*, v. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

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PLAINTIFFS' SUPPLEMENTAL SUMMARY JUDGMENT BRIEF

INTRODUCTION

According to the Court's decision on the motion to dismiss, the plaintiffs in this case must prove that (1) "those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated," (2) "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect," and (3) "the mapmakers' intent to burden a particular group of voters by reason of their views" was a but-for cause of the "adverse impact." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596-97 (D. Md. 2016).

We demonstrated in our prior briefs (Dkt. 177, at 3-16; Dkt. 191, at 2-10) that there is no genuine dispute that those responsible for Maryland's 2011 redistricting specifically intended to dilute Republicans' votes

because of their past successful support for Representative Roscoe Bartlett. Thus, all three judges of this Court expressed an inclination, at the July 14, 2017 preliminary injunction hearing, to grant summary judgment to plaintiffs on that issue. *See* 7/14/17 Hr'g Tr. (Ex. A) 44:2-5 (Judge Bredar: "I think you've proven it, frankly, in this record without a further trial."); *id.* 32:6-10 (Judge Russell observing that "much of the evidence supports intent" and indicating that he had no "issue" with that element); *id.* 68:6 (Judge Niemeyer: "[T]he evidence [of intent] is overwhelming."). *See also* S. Ct. Oral Arg. Tr. (Ex. B) 40:15-16 (Justice Kagan: "I mean, how much more evidence of partisan intent could we need?").

We also demonstrated that those responsible for the redistricting plan achieved their specifically intended goal: There is no genuine dispute that Republican votes in the Sixth District were significantly diluted as a consequence of moving large majority-Democratic areas into, and majority-Republican areas out of, the district. *See* Dkt. 177-19 (PI Ex. Q), at 3 (Plaintiffs' expert Dr. Michael McDonald concluding that the redistricting "ha[d] the effect of diminishing the ability of registered Republican voters to elect candidates of their choice"); Dkt. 177-48 (PI Ex. TT), at 2 (State's expert Dr. Allan Lichtman describing the "obvious" conclusion "that the 2011 Maryland congressional redistricting plan improved Democratic prospects in Maryland's Congressional District 6"). The dilution of Republican votes was so severe that—according to the same metrics used by the mapdrawers

themselves to accomplish the gerrymander—it made a previously safe Republican seat essentially out of reach for Republican voters moving forward. As Justice Kagan observed, "the Maryland legislature got exactly what it intended, which was you took a Republican district, like a safe Republican district, and made it into not the safest of Democratic districts but a pretty safe one." S. Ct. Oral Arg. Tr. (Ex. B) 41:13-18.[1]

Finally, we demonstrated that Republican votes in the Sixth District would not have been so badly diluted absent the specific intent to draw a "7-1 map" by flipping the Sixth District. There is no evidence that any of the other considerations in the redistricting necessitated the Sixth District's highly-targeted southward dip into Montgomery County, or that any other consideration otherwise would have resulted in such severe dilution of Republican votes.

Each of these conclusions now finds significant additional support in both the majority and concurring opinions in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). The majority opinion confirmed in clear and certain terms that vote dilution is a cognizable injury in partisan gerrymandering cases like this, and it held that such

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[1] A plaintiff can also establish actionable vote dilution by "produc[ing] an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight." *Gill v. Whitford*, 138 S. Ct. 1916, 1936 (2018) (Kagan, J., concurring). "The precise numbers are of no import. The point is that the plaintiff can show, through drawing alternative district lines, that partisan-based packing or cracking diluted her vote." *Id.* We have done just that. *See* Dkt. 177, at 21.

claims must be brought in exactly the kind of single-district challenge that we have brought here. And both the majority and concurring opinion lend additional support to our contention that plaintiffs' injury inheres not in changed electoral outcomes themselves, but in the gerrymander's burdening of their votes and associational rights, making it harder for them to achieve electoral success. There is strong—indeed, undisputed—evidence of such burdens and causation in this case.

The Supreme Court's disposition of the appeal in this case, moreover, demonstrates the need for a swift resolution to this litigation. If this Court does not enter a final judgment near the end of the year, there is a risk that plaintiffs' claim might be mooted by passage of the 2020 election before relief can be entered. The Court accordingly should enter summary judgment for plaintiffs as expeditiously as possible. Or, if it enters only partial summary judgment, it should set a trial date at the earliest possible time at which the judges of the Court have overlapping availability.

ARGUMENT

I. UNDER *GILL*, PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON BURDEN AND CAUSATION

A. *Gill* confirms that a traditional vote dilution analysis is appropriate to demonstrate injury in partisan gerrymandering cases

Gill involved a statewide challenge to the partisan gerrymander of Wisconsin's 2011 legislative redistricting map. The plaintiffs in *Gill* "identif[ied] their injury as not simply their inability to elect a representative in their own districts, but also their reduced opportunity to be represented by Democratic legislators across the state." 138 S. Ct. at 1924 (quotation marks omitted). Because the legislative gerrymander was a statewide project that affected the composition of the entire state legislature, the plaintiffs argued (and the district court found) that "they should be permitted to bring a statewide claim." *Id.* (quotation marks omitted).

The Supreme Court disagreed, holding that the plaintiffs "ha[d] not shown standing under the theory upon which they based their claims for relief." *Gill*, 138 S. Ct. at 1929. "To the extent the plaintiffs' alleged harm is the dilution of their votes," the Court explained, "that injury is district specific." *Id.* at 1930. The Court went on:

> An individual voter in Wisconsin is placed in a single district. He votes for a single

> representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This disadvantage to the voter as an individual therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be limited to the inadequacy that produced his injury in fact. In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district.

Id. (quotation marks, alteration marks, and citations omitted).

In two respects, the Court's opinion in *Gill* supports plaintiffs' claim in this case. ***First***, it confirms that gerrymandering claims are best understood as *vote dilution* claims. The harm of vote dilution, according to *Gill*, "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." 138 S. Ct. at 1931. At the most basic level, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Bush v. Gore*, 531 U.S. 98, 107 (2000) (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)). The Court in *Gill* thus described vote dilution as a "burden on the plaintiffs' votes," which calls for a district-by-district analysis of how an alleged gerrymander "burdened [the plaintiffs'] individual vote[s]." 138 S. Ct. at 1932-33. That makes sense: "Where an

election district could be drawn in which minority voters form a majority but such a district is not drawn," there is a "denial of the opportunity to elect a candidate of choice," which is "a present and discernible wrong." *Bartlett v. Strickland*, 556 U.S. 1, 18-19 (2009). That is exactly the theory that we have pressed in this case.

Second, *Gill* describes the placement of an individual in a "cracked" district (like Republican voters in Maryland's Sixth District) as a "disadvantage to the voter as an individual." 138 S. Ct. at 1930 (quotation marks and alteration marks omitted). Of course, a state law that "places a particular burden on an identifiable segment of [the State's] voters" and "burdens the[ir] availability of political opportunity" based on their "political preferences" violates individual constitutional rights. *Anderson v. Celebrezze*, 460 U.S. 780, 792-94 (1983) (quotation marks omitted). That is just what a partisan gerrymander does, and—as we demonstrated in our prior briefs and reiterate below—it is just what Maryland lawmakers did in 2011 to Republican voters in the Sixth District.

B. Plaintiffs have undisputed evidence of traditional vote dilution, including causation

As we explained in the preliminary-injunction reply brief (Dkt. 191, at 11), vote dilution occurs when district lines are drawn so that the disfavored political party has "less opportunity . . . to elect candidates of

their choice." *Davis v. Bandemer*, 478 U.S. 109, 131 (1986) (plurality opinion) (quotation marks omitted). As *Gill* confirms, vote dilution is caused "either 'by the dispersal of [minority voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [minority voters] into districts where they constitute an excessive majority.'" *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (quoting *Thornburgh v. Gingles*, 478 U.S. 30, 46 n.11 (1986)).

The most developed body of law on vote dilution arises in the context of racial vote dilution under Section 2 of the Voting Rights Act. To establish that vote dilution has "impeded the ability of minority voters to elect representatives of their choice" (*Gingles*, 478 U.S. at 51), a Section 2 plaintiff must satisfy the so-called *Gingles* preconditions: ***First***, "[the] minority group must be sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017) (quotation marks omitted). ***Second***, "the minority group must be politically cohesive." *Id.* (quotation marks omitted). ***Third***, the majority "must vote sufficiently as a bloc to usually defeat the minority's preferred candidate." *Id.* (quotation marks and alteration marks omitted).

Each of these three elements is directed toward the question of causation. If the targeted group is not "able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a [reasonably drawn] single-member district" in the area, then the drawing of the district's lines "cannot be

responsible for minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50. Similarly, if the targeted group cannot "show that it is politically cohesive," then "it cannot be said that the [redistricting] thwarts [its] interests." *Id.* at 51. And if the majority does not "vote[ ] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," then cracking the minority group will not "impede[ ] its ability to elect its chosen representatives." *Id.* (internal citations omitted). When these three conditions are satisfied, however, it follows that a denial of "equal electoral opportunity" is the but-for result of the lines that the legislature drew. *Johnson v. De Grandy*, 512 U.S. 997, 1012 (1994).[2]

As our redistricting expert, Dr. Michael McDonald, explained, this traditional Section 2 vote-dilution analysis fits naturally in partisan gerrymandering cases.

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[2] To be sure, *Johnson* held that the *Gingles* preconditions by themselves are not independently "sufficient" to demonstrate the substance of a Section 2 vote dilution claim. 512 U.S. at 1011. The Court stressed that the inquiry does not focus on the three preconditions for their own sake, but on the deprivation of "equal electoral opportunity" in light of all "relevant facts." *Id.* at 1012. But in that regard, the Court expressly framed *Johnson* as an interpretation of Section 2 of the VRA. And *Bartlett* emphasized that the Supreme Court's opinions interpreting "the text of § 2" do "not apply to cases in which there is intentional discrimination" (556 U.S. at 19-20), which is this case. We therefore propose to rely on the *Gingles* preconditions only as a commonsense (and time-tested) guide for identifying causation in partisan gerrymandering cases involving intentional discrimination—certainly not as a standalone framework for establishing liability on the whole.

See Dkt. 177-19 (PI Ex. Q), at 3-4. And that analysis is readily satisfied here.

1. Numerosity and compactness

There is no dispute that historical Republican voters are sufficiently numerous and geographically compact to form the majority of a reasonably drawn district in northwest Maryland. As the State's own witness explained, the Sixth District has comprised a consistent core of territory in northwest Maryland since its creation in the Eighteenth Century. *See* Dkt. 186-17, at 7-14 (Willis report). And as recent history conclusively demonstrates, it is possible to draw a single-member district in that area in which voters who support Republican candidates are able to elect the representative of their choice. Between 1990 and 2010, they did just that. *See* Dkt. 177-5 (PI Ex. C), ¶ 8. The first precondition accordingly is satisfied.[3]

2. Political cohesion and bloc voting

There is also no dispute that historical Republican voters are politically cohesive and that both Republicans and Democrats both engage in bloc voting.

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[3] Focus on the ability of Republican voters to form the majority of a reasonably drawn district also clarifies that the benchmark for measuring vote dilution is not necessarily the immediately prior district; it is, instead, the full range of hypothetical districts that could be drawn in the area. It also clarifies that a deliberate perpetuation of a prior partisan gerrymander could also violate the First Amendment.

a. Using self-reported party registration data derived from the Cooperative Congressional Election Study, Dr. McDonald evaluated the Sixth District's congressional elections in 2012 and 2014, in addition to the presidential and senatorial elections in 2012 and the gubernatorial election in 2014. Dkt. 177-19 (PI Ex. Q), at 7-8. He concluded—no surprise—that self-reported registered members of the two major parties are politically cohesive. "Democrats and Republicans have distinct candidate preferences in that at least a majority of registered Democrats prefer the Democratic candidate and at least a majority of registered Republicans prefer the Republican candidate." *Id.* at 8-9. Dr. McDonald thus concluded that he is "confident within prevailing professional standards that registered Democrats in the Sixth Congressional District prefer Democratic candidates and registered Republicans prefer Republican candidates." *Id.* at 9.

The Democratic Performance Index and the Partisan Voter Index both offer further evidence of political cohesion and bloc voting among historical Democratic and Republican voters. Those metrics show that when a district's populace comprises a majority of Republican voters, the district is highly likely to elect the Republican candidate rather than the Democratic one; and when it comprises a majority of Democratic voters, it is highly likely to elect the Democratic candidate rather than the Republican one. *See* Dkt. 191, at 7-9; Dkt. 191-8 (PI Ex. KKK), at 628. This is a necessary premise of the practice of partisan gerrymandering. If voters' partisan identities were *not* stable from election to

election, so that Democrats did not generally vote for Democratic candidates and Republicans did not generally vote for Republican candidates, we would not see mapdrawers attempting to achieve partisan advantage by moving voters in and out of districts on the basis of their voting histories and party affiliations. But we do—and with great effect.

There is yet further evidence of generally stable political cohesion and bloc voting in this case: In the elections following the 2011 gerrymander, (1) those precincts that were *retained* in the Sixth District after the gerrymander continued to vote predominantly for Republican candidates for office; (2) those precincts that were *removed* from the district have continued to vote very strongly for Republican candidates for office, and (3) those districts that were *added* to the district have continued to vote strongly for Democratic candidates for office (*see* Stein Decl. ¶¶ 13-15 (Ex. C)):

	TABLE 1: Vote share for Republican candidate as a percentage of all election-night votes cast				
	2008	2010	2012	2014	2016
precincts **retained**	53.7%	57.8%	47.8%	59.5%	51.9%
precincts **removed**	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
precincts **added**	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

These data corroborate the relative stability of voters in the Sixth District over time, so that "dispersal of [Republican voters] into [surrounding] districts" ensured that "they constitute[d] an ineffective minority of voters." *Voinovich*, 507 U.S. at 154.

b. On the other side of the scales, there is not one iota of evidence to suggest that historical Republican voters and historical Democratic voters do not vote reliably as blocs from election to election. In saying this, we are mindful that Judges Bredar and Russell expressed some concern that proof of *past* political cohesion and bloc voting may not reliably show *future* political cohesion and bloc voting—which is to say that such proof may not show that the gerrymander has actually changed the outcome of an election. *E.g.*, 7/14/17 Hr'g Tr. (Ex. A) 37:10-12 (Judge Russell: "There were a number of factors that may or may not have contributed to [Representative Bartlett's] defeat."); *id.* 44:14-18 (Judge Bredar: "[H]ow can you make, with sufficient certainty, the causal link between all of this nefarious activity—and I'll use the word nefarious—that you have so expertly proven here, and the actual outcome when there [are other] force[s] at work [in the election]?"); *id.* 45:9-10 (Judge Russell: "[Y]ou can't group these individuals together and expert [*sic*] that individuals have the same mindset.").

Those concerns are answered by both the law and the facts.

Take first the *law*. The Supreme Court has instructed the lower courts to undertake bloc-voting

analyses in Section 2 cases, based on the same inference that we are asking the Court to make here: that political attitudes and predispositions are relatively stable from year to year, and therefore that "electoral history" provides an adequate legal basis for identifying actionable vote dilution, including the possibility that vote dilution has changed electoral outcomes. *Cooper*, 137 S. Ct. at 1470-71. Put another way, the Court's Section 2 vote dilution cases teach that an historical bloc-voting analysis is—*as a matter of law*—a sufficiently reliable predictor of future voting behavior to support a finding of vote dilution, and that the targeted minority has suffered the "discernible wrong" of having been denied an "opportunity to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11 & 19.

Take next the *facts*. Every bit of evidence bearing on this issue demonstrates that blocs of voters in the Sixth District behave consistently from election to election. *See supra*, pages 6-7. The contrary suggestion—that the Sixth District's dramatic swing in favor of Democratic candidates after 2011 may have been attributable to a massive and unprecedented change in voter attitude rather than the mapdrawers' calculated linedrawing—depends on the unsupported speculation that between 2010 and 2012, tens of thousands of Republican voters spontaneously abandoned their party and began supporting Democratic candidates instead.

Not only is the record devoid of any support for that concern, but contemporary social science literature uniformly refutes it. Academic literature shows that voters are "socialized" into a particular party at

relatively young ages, and partisan affiliation tends to harden in early adulthood. *See* Donald Green et al., *Partisan Hearts and Minds, Political Parties and the Social Identities of Voters* 10-11 (2002) (Stein Decl. Ex. C-2). Once formed, these "identities are enduring features of citizens' self-conceptions," and "remain intact during peaks and lulls in party competition." *Id.* at 4-5. In fact, partisan identity remains among the strongest predictors of voter preferences, even more so than gender, class, religion, and often race. *Id.* at 3. For these reasons, it is widely recognized that the distribution of partisan identities among the electorate "provides powerful clues as to how elections will be decided." *See* Donald P. Green et al., "Partisan Stability: Evidence from Aggregate Data," in *Controversies in Voting Behavior* 356 (Richard G. Niemi & Herbert F. Weisberg eds., 4th ed. 2001) (Stein Decl. Ex. C-3). This, again, is a necessary premise of partisan gerrymandering; without it, gerrymandering would not take place at all.

In recent years, moreover, the predictive power of partisan identity has increased as partisan behavior has become even more stable. Based on an analysis of the American National Election Studies' time-series data, for example, the "observed rate of Americans voting for a different party across successive presidential elections has never been lower." Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365, 365 (2017) (emphasis omitted) (Stein Decl. Ex. C-4). As a result, each party has a reliable and predictable "base of party support that is less responsive to short-term forces." *Id.*

(emphasis omitted). Recent increases in partisan "intensity" have further solidified these dynamics: A Pew Research Report notes that "[t]oday, 92% of Republicans are to the right of the median Democrat, and 94% of Democrats are to the left of the median Republican," making crossover votes between the parties even fewer and farther between. *See* Pew Research Ctr., *Political Polarization in the American Public* 6 (2014) (Stein Decl. Ex. C-5).

It is no answer to say that many voters in the Sixth District are independent voters. "Most of those who identify as independents lean toward a party." Pew Research Ctr., *A Deep Dive into Party Affiliation* 4 (2015) (Stein Decl. Ex. C-6). And voters who identify as independents but who lean towards a party generally exhibit voting behavior highly similar to registered partisans. David B. Magleby & Candice Nelson, *Independent Leaners as Policy Partisans: An Examination of Party Identification and Policy Views*, The Forum, Oct. 2012, Article 6, at 1, 17 (Stein Decl. Ex. C-7). Because the DPI depends on past voter history rather than party registration, moreover, independent voters who generally vote for Republican candidates were treated indistinguishably from registered Republicans with the same voting histories. *Cf.* Dkt. 186-41, at 48:10-50:12 (Dr. McDonald explaining how his analysis accounted for independent voters by focusing on election returns rather than party affiliation).

To be clear, none of this is to suggest that individual voters do not think for themselves or meaningfully evaluate and respond to individual candidates. Nor

does it suggest that partisan identity is the only factor that influences voter behavior or that voter behavior can be predicted with absolute certainty. That is why we see modest fluctuations in election returns from election to election (*see* Table 1, *supra*, at 8) and why the DPI and PVI do not predict electoral outcomes with certitude. But the social science literature does conclusively corroborate what Dr. McDonald's analysis of the Sixth District demonstrates, what the DPI and PVI logically imply, and what the actual elections returns show: that partisan identity is stable over time, that it therefore can be used to predict voter behavior with a high degree of confidence, and that moving district lines as the State did in 2011 is a highly effective means of diminishing electoral opportunity, inflicting very concrete and practical effects. Indeed, that is the necessary premise of the Supreme Court's vote dilution cases under Section 2 of the VRA.

C. Vote dilution is an actionable injury independent of changed electoral outcomes

Plaintiffs' theory of injury has all along included unconstitutional vote dilution. Dkt. 44 ¶¶ 7b, 28, 93; Dkt. 68, at 1, 7-8, 15-16. We acknowledged from the outset, however, that vote dilution—even when intentionally inflicted—may not be sufficiently significant to make a practical difference in all cases. We therefore took the position that a partisan gerrymandering plaintiff must prove that intentionally inflicted dilution has resulted in a real and concrete adverse effect, not a de minimis one, before he will be entitled to relief.

E.g., Dkt. 68, at 15-16; Dkt. 85, at 4-5. This Court, in denying the State's motion to dismiss, agreed: "[T]o establish the injury element of a retaliation claim, the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. In other words, the vote dilution must make some practical difference." *Shapiro*, 203 F. Supp. 3d at 597.

In light of the evidence in this case, we have consistently argued that the intentional dilution of plaintiffs' votes amounted to a practical injury *because* it has dictated the outcomes of subsequent elections. We confidently stand by that assertion: Because of the huge shifts in the political composition of the Sixth District's population—overwhelmingly from voters who had previously cast their ballots for Republicans to those who had cast them for Democrats—the *Cook* PVI showed that the chances of a Republican victory in the district dropped from 99.7% in 2010 to just 6% in 2012. Dkt. 191, at 7-9. The DPI—the metric employed by the mapdrawers themselves—similarly showed that the chances of a Republican victory fell from 100% in 2010 to 7.5% in 2012. *Id.* And, of course, these predictive metrics proved devastatingly reliable in this case: Democrat John Delaney defeated Rep. Bartlett in the 2012 election and has won reelection ever since. Dkt. 177-5 (PI Ex. C), ¶¶ 54-56. This is what gerrymandering is all about: denying the targeted minority a meaningful "opportunity to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11.

But it does not follow from our factual contentions concerning the 2012, 2014, and 2016 elections that, to establish a cognizable burden in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must indispensably show that every electoral outcome is (and will continue to be) unquestionably attributable to the gerrymander. *Benisek v. Lamone*, 266 F. Supp. 3d 799, 808 (D. Md. 2017). As Justice Kagan observed in *Gill*, only a "perfect" gerrymander would ensure that when "a voter resides in a packed district, her preferred candidate will win no matter what," and "when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing." 138 S. Ct. at 1936. But the law does not demand transcendent wrongdoing before a court may grant relief. The Supreme Court's vote-dilution cases recognize that vote dilution and the inability to win elections do not necessarily go hand-in-hand. *Gingles*, 478 U.S. at 31. To be sure, electoral outcomes are probative "evidence" bearing on the question of vote dilution. *Johnson*, 512 U.S. at 1011. But plaintiffs' injury inheres in their diminished electoral opportunity, not in the electoral outcomes themselves.

Thus, even if the Republicans in the Sixth District had won an election somewhere along the way, it would not necessarily refute our claim that the gerrymander has "disadvantage[d]" the plaintiffs "as . . . individual[s]" in the electoral process (*Gill*, 138 S. Ct. at 1930 (quotation marks omitted)) in a constitutionally significant manner. If, for example, the 2011 gerrymander had changed only two of the three congressional

elections between 2012 and 2016, that still would be a sufficiently serious burden upon plaintiffs' electoral opportunity to warrant relief—it would be no defense for the State to say that it had succeeded in rigging only two elections when it was really going for all three.

This much is confirmed by the Supreme Court's ballot access cases. In *Anderson*, the Court confronted an early candidacy filing deadline that applied only to independent candidates. Invalidating that discriminatory regulation under the First Amendment, the Court explained that "'the right of qualified voters, regardless of their political persuasion, to cast their votes effectively'" can be "heavily burdened" by voting "restrictions" and "regulation[s]." 460 U.S. at 787-88 (quotation marks omitted). The Court ultimately invalidated the early filing deadline in *Anderson* because—as a matter of common-sense practicalities—it selectively "place[d] a particular burden on an identifiable segment of Ohio's independent-minded voters." *Id.* at 792. Because the deadline applied "unequally" among the political parties, in other words, it "burden[ed] the availability of political opportunity" based on the "political preferences" of voters and was therefore unlawful. *Id.* at 793-94 (quotation marks omitted). Thus, it could not stand.

Consider also *Cook v. Gralike*, 531 U.S. 510 (2001), where the Supreme Court invalidated a Missouri law that placed a notation next to each candidate's name on the ballot, relaying the candidate's position on term limits. *Id.* at 514-27. Although "the precise damage the

labels may exact on candidates [was] disputed" there, the Court did not hesitate to invalidate the regulation because "the labels surely place their targets at a political disadvantage." *Id.* at 525. In language that easily could be mistaken for a condemnation of partisan gerrymandering, the Court explained that the Elections Clause does not authorize the States to "dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id.* at 523 (quotation marks omitted).

In neither *Anderson* nor *Cook* did the Court require the plaintiffs to prove that the challenged regulations changed the outcome of the election as a precondition to relief. It was enough to show (just as in a vote dilution case like this one) that the regulation had put the plaintiffs at a concrete "political disadvantage." *Cook*, 531 U.S. at 525.

For the same reasons, it cannot be said that Maryland's 2011 gerrymander of the Sixth District did not inflict a concrete injury under the First Amendment simply because "Congressman Delaney nearly lost control of his seat in 2014." *Benisek*, 266 F. Supp. 3d at 813. Regardless whether the election in 2014 was a close one, the fact remains that the Sixth District was deliberately converted from "a safe Republican district . . . into not the safest of Democratic districts but a pretty safe one." S. Ct. Oral Arg. Tr. (Ex. B) 41:14-18 (Justice Kagan). The gerrymander thus manifestly reduced the effectiveness of plaintiffs' votes and diminished their electoral opportunity, with concrete practical effects.

That is an actionable burden on plaintiffs' representational rights.

D. Justice Kagan's *Gill* concurrence confirms that plaintiffs' injury inheres in effects other than changed electoral outcomes

Although we are confident that we have proved beyond genuine dispute that the gerrymander dramatically diluted Republican votes in the district—so much so that it denied them a meaningful opportunity to win the elections in 2012, 2014 and 2016—we have not hitched our wagon to that horse alone. In fact, we have also consistently argued that the 2011 gerrymander has inflicted a more-than-de-minimis injury insofar as it has chilled and disrupted the associational and expressional activities of Republicans in the Sixth District. *E.g.*, Dkt. 44 ¶¶ 112-119; Dkt. 177, at 18-19.

Justice Kagan's concurring opinion in *Gill* lends substantial support to this additional way of conceptualizing plaintiffs' injury. In her view, partisan gerrymandering claims are properly litigated as vote dilution claims because gerrymandering directly "burden[s] individual votes" by diminishing electoral opportunity. 138 S. Ct. at 1934. "But," in Justice Kagan's view, "partisan gerrymanders inflict other kinds of constitutional harm as well." *Id* at 1938. "Among those injuries, partisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their members." *Id*. "Members of the disfavored party in the State deprived of

their natural political strength by a partisan gerrymander, may," in particular, "face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." *Id.* (quotation marks omitted). This analysis reflects the same considerations that the Supreme Court found relevant in *Anderson*. *See* 460 U.S. at 792 (inhibition of campaigning, "organizing efforts," "recruit[ment] and ret[ention]" of volunteers, "media publicity," and fundraising are identifiable burdens).

There is clear evidence of just such burdens on plaintiffs' associational rights in this case. To begin, voter engagement in support of the Republican Party has dropped off significantly since the 2011 gerrymander. We submit that the best indicator of this effect is the falloff in turnout for the Republican primary elections in midterm years. Prior to the gerrymander, the Republican primary was the most important election for selecting the district's representative, given that the Republican nominee was highly likely to win the general election regardless of whom the Democrats selected in their own primary. And during the midterm elections, the congressional race was at the top of the federal ticket and thus most likely to drive primary voters to the polls.

Publicly-available primary election data certified by the defendants themselves shows that turnout for the Republican primary elections in midterm years has decreased dramatically since 2011, despite increased party registration. In Allegany County, for example, turnout for the 2010 Republican primary was a robust 42.8%. Dkt. 191-11 (PI Ex. NNN), at 3. But turnout plummeted by more than a third, to 26.7%, in the 2014 Republican primary. *Id.* at 9. Allegany County is no outlier; participation in midterm Republican primary elections has dropped precipitously in all three counties that remained entirely in the Sixth District after the 2011 gerrymander:

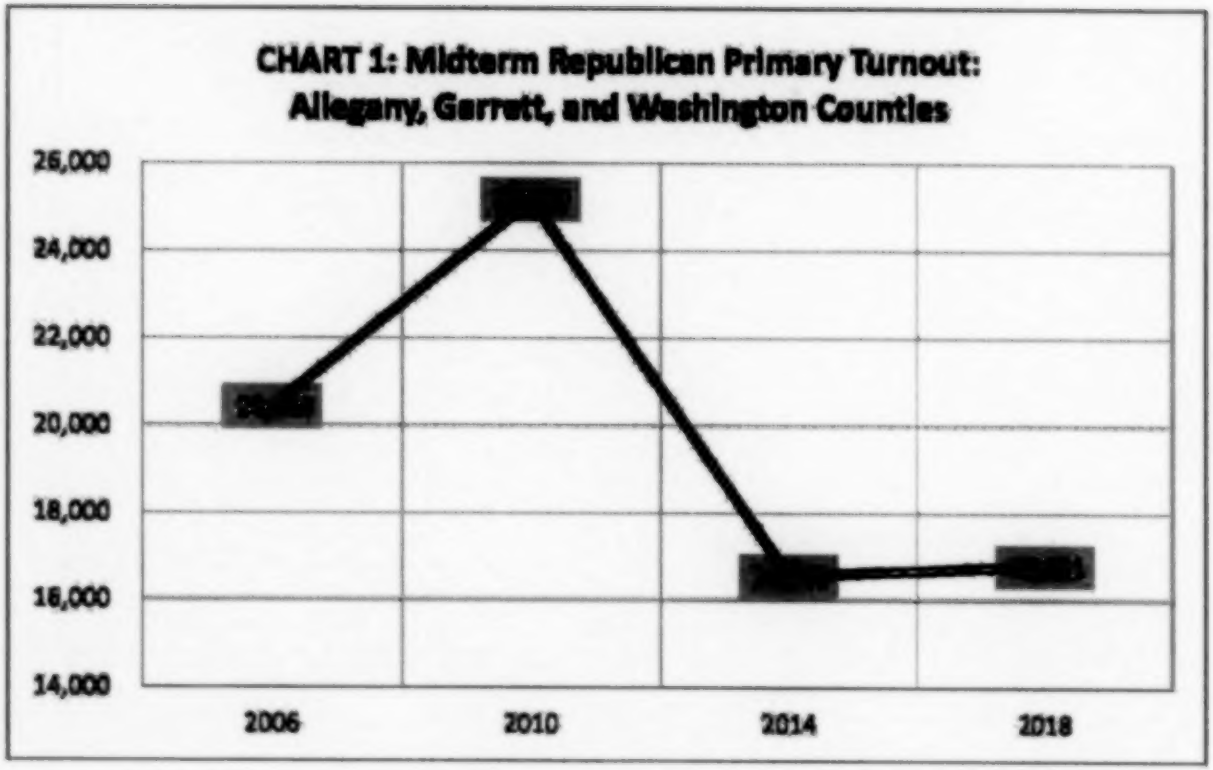
CHART 1: Midterm Republican Primary Turnout:
Allegany, Garrett, and Washington Counties
26,000
24,000
22,000
20,000
18,000
16,000
14,000
2006
2010
2014
2018

See Stein Decl. ¶¶ 18-22.[4]

Elections returns in the general elections corroborate the same chilling effect. In the 138 voter precincts that were in the Sixth District both before and after the gerrymander, turnout among Republican voters in 2008 stood at 74,299, comprising 53.7% of the total share of election-day votes cast. Stein Decl. ¶ 13. In the next presidential election year in 2012, Republican voter turnout plummeted to 60,969, comprising 47.8% of the total election-day votes cast. Stein Decl. ¶ 13.

Fundraising by the Republican Central Committees in the counties that remained entirely in the Sixth District has also fallen off noticeably since the 2011 gerrymander. According to Maryland State Board of Elections campaign finance filings by those committees, fundraising during midterm election years has fallen by more than 6%. *See* Stein Decl. ¶ 37, Ex. C-11. Fundraising during presidential election years has suffered as well, dropping by over 12%. *Id.* The following graph (*see id.*) shows the effect:

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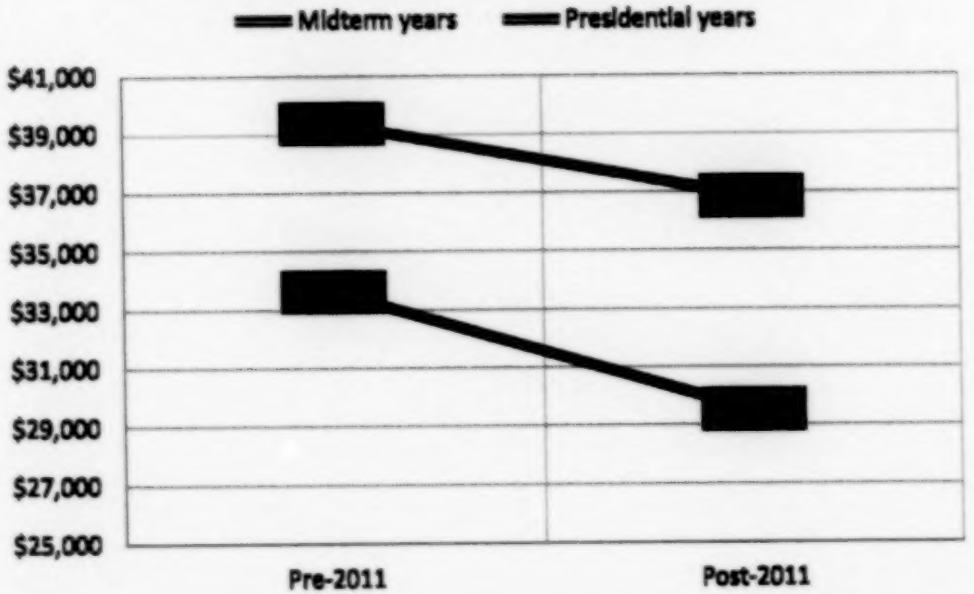
[4] Republican primary turnout fell district-wide as well (Stein Decl. ¶¶ 18-22), but that is expected regardless of chilling, given that so many Republican voters were moved out of the district and replaced with Democratic voters.

CHART 2: Fundraising by the Republican Central Committees in Allegany, Garrett, and Washington Counties



As we explained in our prior briefing, moreover, all of this hard data is corroborated by the plaintiffs' on-the-ground experiences. *See* Dkt. 177-1, at 18-19.

This evidence, taken as a whole, substantiates precisely the kind of associational injury that Justice Kagan described in her concurring opinion. Voter support—expressed in terms of both voter turnout and financial support—has been chilled by the gerrymander. As she observed in the same opinion, "[c]ourts have a critical role to play in curbing partisan gerrymandering," and it is especially in circumstances like these, with clear evidence of substantial burdens on representational and associational rights, that "the need for judicial review is at its most urgent." *Gill*, 138 S. Ct. at 1941.

II. IF THE COURT DENIES SUMMARY JUDGMENT IN WHOLE OR PART, THE SUPREME COURT'S DISPOSITION OF THE APPEAL IN THIS CASE CONFIRMS THE NEED FOR A SPEEDY RESOLUTION OF THE CASE

The record in this case irrefutably demonstrates (1) a specific intent to dilute Republican votes in for [*sic*] the former Sixth District, (2) success in bringing that goal about, leading to real and identifiable burdens on plaintiffs' representational and associational rights, and (3) no neutral justification to refute but-for causation. Against this backdrop, the Court should enter summary judgment for the plaintiffs. That is

particularly so because the standard at the final judgment stage requires a less robust showing that [*sic*] it does at the preliminary stage. *See* 7/14/17 Hr'g. Tr. (Ex. A) 98:11-16 (Judge Bredar observing that "51 percent probably carries the day [when] . . . seeking a final permanent injunction" but "probably doesn't carry the day when you're in a preliminary proceeding seeking a PI.").

But if the Court disagrees, and it determines instead that a trial is necessary to resolve genuine disputes in the evidence, we respectfully submit that a trial at the earliest possible date is imperative. As the Supreme Court's disposition of the appeal in this case shows, relief (if any) must be entered sufficiently far in advance of the 2020 elections to ensure that it will not risk undermining "due regard for the public interest in orderly elections." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). For the reasons given in plaintiffs' statement in the joint status report (Dkt. 209), we respectfully request that the Court schedule a trial at the earliest time during which the judges of this Court are able to find overlapping dates on their schedules, and in no event later than October 2018.

CONCLUSION

The Court should enter summary judgment for plaintiffs. If it denies summary judgment, it should alternatively set a trial date at the earliest possible time.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al., *Plaintiffs*, v. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

Declaration of Micah Stein in Support of Plaintiffs' Supplemental Summary Judgment Brief

I, Micah Stein, hereby declare and state:

1. I am over 18 years of age and am competent to testify to the matters stated in this declaration.

2. I am an associate at the law firm of Mayer Brown LLP, a member of the Bar of the State of New York and the Bar of the District of Columbia, admitted *pro hac vice* to this action, and counsel for Plaintiffs in the above-captioned litigation. I submit this declaration in support of Plaintiffs' Supplemental Summary Judgment Brief. I have personal knowledge of the facts stated herein.

A. *General Election Results by Precinct*

3. The Maryland State Board of Elections website (https://elections.maryland.gov/elections/) posts data files for each election cycle containing general election-day

results broken down by county and precinct. These data files are publicly available for download in Excel-format spreadsheets.

4. As described by the Board of Elections website, the precinct-level data files contain the following rows of information: (a) County, (b) Election District, (c) Election Precinct, (d) Candidate Name, (e) Party, (f) Office Name, (g) Office District, (h) Winner (a Y for contest winners), (i) Write-In (a Y for write-in candidates), (j) Election Night Votes For, and (k) Election Night Votes Against.

5. The precinct-level voting data were downloaded for the 2008 through 2016 election cycles for all precincts that are part of the current (post-2011) or former (pre-2011) Maryland Sixth Congressional District. All votes cast were then recorded in a separate spreadsheet for each Congressional election for Democratic candidates, Republican candidates, and an amalgamation of all third party/write-in candidates for each precinct.

6. The data files for the 2008 election cycle were downloaded from the Board of Elections website: https://elections.maryland.gov/elections/2008/election_data/index.html.

7. The data files for the 201[illegible] election cycle were downloaded from the Board of Elections website: https://elections.maryland.gov/elections/2010/election_data/index.html.

8. The data files for the 2012 election cycle were downloaded from the Board of Elections website: https://elections.maryland.gov/elections/2012/election_data/index.html.

9. The data files for the 2014 election cycle were downloaded from the Board of Elections website: https://elections.maryland.gov/elections/2014/election_data/index.html.

10. The data files for the 2016 election cycle were downloaded from the Board of Elections website: https://elections.maryland.gov/elections/2016/election_data/index.html.

11. To identify the voting precincts impacted by the 2011 Redistricting, publicly available data files were downloaded from the Board of Elections website. The files list all voting precincts for each election cycle, sorted by county. The following data files were downloaded: https://elections.maryland.gov/elections/2010/election_data/State_Precinct_Reference_2010_General.csv and https://elections.maryland.gov/elections/2012/election_data/state_precinct_reference_2012_general.xls.

12. A spreadsheet was created showing the vote tallies for the 2008 through 2016 Congressional elections on a precinct-level for all precincts that are part of the current (post-2011) or former (pre-2011) Maryland Sixth Congressional District. The share of Republican votes in each precinct for each Congressional election from 2008 through 2016 was calculated by dividing the number of votes cast for the Republican candidate by the total number of votes cast in the precinct.

A true and correct copy of this spreadsheet is attached as Exhibit C-1.

13. In those precincts that remained in the Sixth Congressional District before and after the 2011 redistricting, the Republican congressional candidate received the following share of the vote in each election cycle:

a. 2008: 53.7%

b. 2010: 57.8%

c. 2012: 47.8%

d. 2014: 59.5%

e. 2016: 51.9%

14. In those precincts that were removed from the Sixth Congressional District during the 2011 redistricting, the Republican congressional candidate received the following share of the vote in each election cycle:

a. 2008: 61.6%

b. 2010: 65.7%

c. 2012: 64.2%

d. 2014: 71.5%

e. 2016: 69.3%

15. In those precincts that were added to the Sixth Congressional District during the 2011 Redistricting, including newly-created and/or split precincts

– the Republican congressional candidate received the following share of the vote in each election cycle:

a. 2008: 28.7%

b. 2010: 34.7%

c. 2012: 30.3%

d. 2014: 37.1%

e. 2016: 32.1%

16. The same data compiled in Exhibit C-1 reveals the total turnout of Republican voters in the precincts that were in the Sixth District both before and after the 2011 Redistricting. In these retained precincts, a total of 74,299 votes were cast in the 2008 general election for the Republican candidate, out of 138,461 total votes cast in these precincts, comprising 53.7% of the total votes cast.

17. In the 2012 election, a total of 60,969 votes were cast for the Republican candidate in the precincts that were in the Sixth District both before and after the 2011 Redistricting. A total of 127,624 votes were cast in these precincts in the 2012 Congressional election; thus, Republican votes comprised 47.8% of the total votes cast.

B. *Sixth District Republican Primary Voter Turnout*

18. The Maryland State Board of Elections website (which is available at https://elections.maryland.gov/elections/) posts publicly the official election results

for each congressional election cycle containing official primary election-day results broken down by congressional district and county. The information posted by the Board of Elections includes the total number of votes received by each congressional primary candidate district-wide, along with the total votes received in each county.

19. According to the "Official 2006 Gubernatorial Primary Election Results for Congressional District 6" posted on the Board of Elections website, a total of 20,425 votes were cast in Allegany, Garrett, and Washington counties, combined, in the 2006 Republican primary in the Sixth Congressional District. District-wide, a total of 57,363 votes were cast in the 2006 Republican primary. The spreadsheet is available at https://elections.maryland.gov/elections/2006/results/primary/congressional_district_06.html.

20. According to the "Official 2010 Gubernatorial Primary Election Results for Representative in Congress – Congressional District 6" posted on the Board of Elections website, a total of 25,167 votes were cast in Allegany, Garrett, and Washington counties, combined, in the 2010 Republican primary in the Sixth Congressional District. District-wide, a total of 70,241 votes were cast in the 2010 Republican primary. The spreadsheet is available at https://elections.maryland.gov/elections/2010/results/Primary/gen_detail_results_2010_1_REP00806.html.

21. According to the "Official 2014 Gubernatorial Primary Election Results for Representative in Congress

– Congressional District 6" posted on the Board of Elections website, a total of 16,563 votes were cast in Allegany, Garrett, and Washington counties, combined, in the 2014 Republican primary in the Sixth Congressional District. District-wide, a total of 28,651 votes were cast in the 2014 Republican primary. The spreadsheet is available at https://elections.maryland.gov/elections/2014/results/primary/gen_detail_results_2014_1_REP00806.html.

22. According to the "Unofficial 2018 Gubernatorial Primary Election Results for Representative in Congress – Congressional District 6" posted on the Board of Elections website, a total of 16,801 votes were cast in Allegany, Garrett, and Washington counties, combined, in the 2018 Republican primary in the Sixth Congressional District. Districtwide, a total of 28,882 votes were cast in the 2018 Republican primary. The spreadsheet is available at https://elections.maryland.gov/elections/2018/results/primary/gen_detail_results_2018_1_REP00806.html.

C. *Attached Exhibits*

23. Attached as Exhibit C-2 is a true and correct copy of excerpts from Donald Green et al., *Partisan Hearts and Minds, Political Parties and the Social Identities of Voters* (2002).

24. Attached as Exhibit C-3 is a true and correct copy of Donald P. Green et al., "Partisan Stability: Evidence from Aggregate Data," in *Controversies in Voting*

Behavior 356 (Richard G. Niemi & Herbert F. Weisberg eds., 4th ed. 2001).

25. Attached as Exhibit C-4 is a true and correct copy of Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365 (2017), *available at* perma.cc/M4J4-V5RM.

26. Attached as Exhibit C-5 is a true and correct copy of Pew Research Ctr., *Political Polarization in the American Public* (2014), *available at* perma.cc/XN2Z-BR8H.

27. Attached as Exhibit C-6 is a true and correct copy of Pew Research Ctr., *A Deep Dive into Party Affiliation* (2015), *available at* perma.cc/ZG3X-C8FM.

28. Attached as Exhibit C-7 is a true and correct copy of David B. Magleby & Candice Nelson, *Independent Leaners as Policy Partisans: An Examination of Party Identification and Policy Views*, The Forum, Oct. 2012, *available at* perma.cc/KX7C-7BKG.

D. *County Republican Central Committee Campaign Donations*

29. Political committees in the state of Maryland are required to file periodic campaign finance reports, detailing all contributions received and expenditures made by the entity. *See* Md. State Bd. of Elections, *Summary Guide: Maryland Candidacy & Campaign Finance Laws* 63-70 (Mar. 2017), *available at* perma.cc/UY6Y-DFBN. The Republican Central Committees for each Maryland county file such reports.

30. The Maryland State Board of Elections maintains a public "Campaign Finance Database" that allows members of the public to, among other things, "(1) Review information about campaign committees," (2) Review filed reports submitted by Campaign Finance Entities," [*sic*] and (3) "Search contributions and expenditures reported by Campaign Finance Entities." This information is publicly available through the Board of Elections website, https://elections.maryland.gov/campaign_finance/index.html.

31. Members of the public seeking to review filed reports by campaign entities are directed to the Maryland Campaign Reporting Information System website, which maintains a searchable Campaign Finance Database, which is available at https://campaignfinancemd.us/Public/ViewFiledReportsMain.

32. Using the Maryland Campaign Reporting Information System website, I located and downloaded the Campaign Finance Report Summary Sheets filed by the County Republican Central Committees for Washington, Allegany, and Garrett counties covering the years 2008, 2010, 2012, and 2014.

33. Attached as Exhibit C-8 are true and correct copies of the Campaign Finance Report Summary Sheets filed with the Maryland State Board of Elections by the Washington County Republican Central Committee during the years 2008, 2010, 2012, and 2014. These reports are publicly available through the Maryland Campaign Reporting Information System

website (https://campaignfinancemd.us/Public/ViewFiled Reports).

34. Attached as Exhibit C-9 are true and correct copies of the Campaign Finance Report Summary Sheets filed with the Maryland State Board of Elections by the Garrett County Republican Central Committee during the years 2008, 2010, 2012, and 2014. These reports are publicly available through the Maryland Campaign Reporting Information System website (https://campaignfinancemd.us/Public/ViewFiled Reports).

35. Attached as Exhibit C-10 are true and correct copies of the Campaign Finance Report Summary Sheets filed with the Maryland State Board of Elections by the Allegany County Republican Central Committee during the years 2008, 2010, 2012, and 2014. These reports are publicly available through the Maryland Campaign Reporting Information System website (https://campaignfinancemd.us/Public/ViewFiled Reports).

36. Part 3 of the Summary Sheets filed by each County Republican Central Committee contains a summary of the total "receipts" by the Committee during the filing period, which represents financial contributions received by the Committee from members of the public, state political committees, and candidate committees, among others. After downloading the Campaign Finance Report Summary Sheets for each County Republican Central Committee, the total financial contributions received by each committee were

calculated for each of the years 2008, 2010, 2012, and 2014. Attached as Exhibit C-11 is a true and correct copy of the document tabulating the annual receipts for the Washington, Allegany, and Garrett County Republican Central Committees.

37. According to the Campaign Finance Report Summary Sheets filed by the County Republican Central Committees, the three county committees combined reported "receipts" in the following amounts for the years 2008, 2010, 2012, and 2014:

a. 2008: $33,604.20

b. 2010: $39,386.34

c. 2012: $29,516.67

d. 2014: $36,829.00

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

07/13/2018	/s/ Micah D. Stein
Date	Micah D. Stein

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE, *et al.*,	*	
Defendants.	*	

* * * * * * *

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Although *Gill v. Whitford*, 138 S. Ct. 1916 (2018), did not resolve the justiciability of partisan gerrymandering claims or clarify the applicable legal standard, it provided instructive guidance on the substantial burden of production plaintiffs in partisan gerrymandering cases must satisfy to establish standing. The Supreme Court's disposition of the appeal in this case, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) ("*Benisek II*"), is also instructive, because it sets forth the reasons why plaintiffs have not satisfied the requirements for an injunction, including requirements that apply equally to "any injunctive relief, preliminary or permanent," *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). Finally, the Supreme Court's decision in *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018), supports this Court's legal conclusion that

Mt. Healthy burden-shifting should not be applied to cases involving complex causal chains, like this one. Together, these three new precedents, combined with the arguments set forth in earlier briefing on defendants' cross-motion for summary judgment, call for granting summary judgment in favor of defendants.

I. PLAINTIFFS CANNOT SATISFY THE INJURY-IN-FACT REQUIREMENTS FOR ARTICLE III STANDING AS SET FORTH IN *GILL V. WHITFORD*.

In partisan gerrymandering cases, like all other cases, "a plaintiff may not invoke federal-court jurisdiction unless he can show 'a personal stake in the outcome of the controversy.'" *Gill*, 138 S. Ct. at 1929 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). That personal stake must be "distinct from a generally available grievance about government." *Gill*, 138 S. Ct. at 1923 (citation omitted). Although plaintiffs here have framed their claim as a challenge "specifically to the 'cracking' of Maryland's 6th Congressional District," ECF 44 ¶ 1, and not a statewide claim, the regional specificity of their claim does not absolve them from the requirement to demonstrate individual standing. Like the plaintiffs in *Gill*, plaintiffs here have identified "vote dilution" as their injury. Accordingly, to establish Article III standing, the plaintiffs here, again like the plaintiffs in *Gill*, must "prove concrete and particularized injuries using evidence . . . that would tend to demonstrate a burden on their individual votes." *Gill*, 138 S. Ct. at 1934. Plaintiffs here have failed to produce evidence sufficient to establish that they

suffered legally cognizable individual harm, and, having represented to this Court that they will not be seeking additional discovery, ECF 209 at 1, their claims must now be dismissed. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) ("[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, the nonmoving party bears the burden of production under Rule 56 to designate specific facts showing that there is a genuine issue for trial") (citation omitted).

Because standing is an "indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at" the relevant stage of litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). On summary judgment, "the plaintiff can no longer rest on" the "'mere allegations'" in her complaint, "but must 'set forth' by affidavit or other evidence 'specific facts'" to demonstrate the standing elements. *Id.* (quoting Fed. R. Civ. P. 56(e)). Plaintiffs have never offered evidence that their inclusion in either the Sixth or Eighth District resulted in "vote dilution," but have stated to this Court that they "recognize full well that vote dilution, in some form, is inevitable in every redistricting, and that it occurs for wide ranges of reasons, including geography and political calculi that have nothing to do with reprisals for prior electoral success." ECF 191 at 16-17. And plaintiffs have never made any attempt to explain how the evidence they have provided demonstrates any "burden

on their individual votes," *Gill*, 138 S. Ct. at 1934, when what they have shown is nothing more than their preferred political party's diminished success in electing its candidate. That showing does not suffice to establish a redressable injury under the Supreme Court's redistricting precedents. *See League of United Latin Am. Citizens* ("*LULAC*") *v. Perry*, 548 U.S. 399, 428 (2006) (plurality op.) ("The circumstance that a group does not win elections does not resolve the issue of vote dilution."); *Davis v. Bandemer*, 478 U.S. 109 (1986) ("[A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult."); *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 77 (1980) ("[T]he right to equal participation in the electoral process does not protect any 'political group,' however defined, against electoral defeat.").

Plaintiffs have never explained how any individual experienced "reprisals for prior electoral success" or how such a reprisal impacted the individual's vote. ECF 191 at 16-17. Plaintiffs have not demonstrated that *they themselves*—Mr. Benisek, Ms. Ropp, Ms. Strine, Ms. O'Connor, Mr. Eyler, Mr. Cueman, and Mr. DeWolfe—were singled out for inappropriate retaliatory treatment by the government. Plaintiffs have offered no evidence, and have not even claimed, that decisionmakers examined the voting history of any of these individuals. Nor is it possible for plaintiffs to offer such proof. That is, the statistical measures Democratic Performance Index ("DPI"), Partisan Voting Index ("PVI"), and any other metric built with voting history,

cannot shed light on any individual's voting experience. Instead, they can be only as specific as the precinct level, because we maintain a secret ballot in this country. *See* Md. Code Ann., Elec. Law §§ 11-402(a), (d)(1); 9-203(4). Even if that were not the case, Mr. Benisek, the only plaintiff remaining from the claims originally filed in 2013, *see Benisek II*, 138 S. Ct. at 1944, could not have been individually identified by decisionmakers as a Republican, because he was an unaffiliated voter at the time redistricting data was prepared. ECF 186-1 at 36. Plaintiffs therefore have not shown that any government official examined their voting conduct. Consequently, they cannot claim to have suffered an injury-in-fact due to any First Amendment retaliation attributable to any government official.

As this Court recognized in its earlier disposition of the preliminary injunction motion, "if an election result is not engineered through a gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred." *Benisek v. Lamone*, 266 F. Supp. 3d 799, 811 (D. Md. 2017) ("*Benisek I*"), *aff'd*, 138 S. Ct. 1942 (2018). If a candidate's loss is "a consequence of voter choice, that is not an *injury*. It is *democracy*." *Id.* at 812. At summary judgment, plaintiffs have the burden of producing evidence that their individual vote was burdened in some manner independent of election results. They have not done so.

A. Plaintiffs Have Not Shown the Existence of Any Burden on Their Individual Vote.

1. Voting History Metrics Cannot Establish Individual Burden.

Plaintiffs' prior assertion that "[t]he DPI and PVI are proof enough of" a concrete injury, ECF 191 at 15, does not withstand scrutiny under *Gill*'s clarification that there must be evidence of added burden to an individual's vote. As explained previously, both the DPI and PVI are averages of past election results. ECF 186-7 (Hawkins Dep.) at 24:12-16; ECF 177-51 (Pls. Ex. WW). *Gill* precludes reliance on "average measure[s]" of "the effect that a gerrymander has on the fortunes of political parties" as a substitute for proof that "address[es] the effect that a gerrymander has on the votes of particular citizens." *Gill*, 138 S. Ct. at 1933. Indeed, similar metrics were available in the *Gill* record for all the districts in which the named plaintiffs resided, but the Supreme Court deemed those measures unacceptable as proof of individual injury-in-fact. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 849-50 (2016) (discussing the "district-by-district partisanship scores" and spreadsheets "comparing the partisan performance of the draft plan to the prior map"). Similarly, under *Gill*, the mere fact that a Democratic candidate prevailed in the 2012, 2014, and 2016 elections, *see* ECF 177-1 at 22, does not establish plaintiffs' injury-in-fact as individual voters, because it is merely evidence of "the fortunes of political parties." *Gill*, 138 S. Ct. at 1933. Election results were also available in the record

in *Gill*. *Whitford*, 218 F. Supp. 3d at 899. Yet the *Gill* plaintiffs' claims were nevertheless remanded because they had not offered sufficient proof of individualized injury to establish standing.

Even more closely analogous to plaintiffs' attempted showing in this case is the evidence offered by plaintiffs in North Carolina's partisan gerrymandering case, which resulted in the Supreme Court's vacatur of a three judge court's judgment in favor of plaintiffs. The three judge court in *Common Cause v. Rucho* concluded that "the 2016 Plan diluted the votes of those Plaintiffs who supported non-Republican candidates and reside in the ten districts that the General Assembly drew to elect Republican candidates. That dilution constitutes a legally cognizable injury-in-fact." 279 F. Supp. 3d 587, 615 (2018); *see also* 279 F. Supp. 3d at 615 n.9 (stating that plaintiffs "have standing to assert district-by-district challenges to the Plan as a whole"). That is exactly the theory of injury-in-fact plaintiffs have alleged in this case. ECF 177-1 at 32. In their attempt to establish injury-in-fact, the *Rucho* plaintiffs used the same types of evidence that plaintiffs identify here, namely predictive statistics, electoral results, and comparative maps, and that evidence was available in the record on a district-by-district basis. Supplemental Br. of League of Women Voters of N.C. 5-13, *Rucho v. Common Cause*, No. 17-1295 (U.S. June 20, 2018).[1] Yet, even with the three-judge court's findings,

[1] Available at https://www.supremecourt.gov/DocketPDF/17/17-1295/50714/20180620124033768_Rucho%20v.%20Common%20

and with briefing outlining the available district-by-district evidence, the Supreme Court nonetheless vacated and remanded the three-judge court's decision for reconsideration in light of *Gill*. *Rucho v. Common Cause*, No. 17-1295, 2018 WL 1335403, at *1 (U. S. June 25, 2018). Given the Court's direction to the three-judge court in *Rucho*, plaintiffs here cannot be correct in suggesting that "[t]he numbers" indicated by predictive statistical measures and electoral results "speak for themselves," ECF 177-1 at 22, when it comes to articulating injury-in-fact.

2. Plaintiffs Have Not Produced Evidence of Additional Factors That Establish A Burden on Their Individual Vote.

The result in *Rucho* should not be surprising, because longstanding Supreme Court precedent prevents plaintiffs from using their preferred candidate's lack of success to establish individual injury-in-fact. The right to "'have an equally effective voice' in the election of representatives" does not bestow on any individual "an independent constitutional claim to representation" based on one's status as a group member, even if that group is, as the plaintiffs contend, composed exclusively of Bartlett voters. *Bolden*, 446 U.S. at 78 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)). The plaintiffs cannot avoid this conclusion by claiming

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to assert individual rights. Each plaintiff's individual vote for Congressman Bartlett had the weight of all other votes cast in Maryland in 2012, just as in 2002, because Maryland created equally populous districts. It is only when the plaintiffs' votes are aggregated with those of other Bartlett supporters or Republican voters that it becomes possible to assert that the *group*'s votes have lost "strength" or have been "diluted" in the current Sixth District compared to its predecessor.

But the plaintiffs offered none of the familiar evidence that usually accompanies claims of vote dilution, such as actual election results showing that Democrats and Republicans in the Sixth District are polarized in their voting habits. ECF 177-19 at 8-11. Instead, the record contains evidence of extensive crossover voting. *E.g.*, *Benisek I*, 266 F. Supp. 3d at 810 (finding Senator Cardin underperformed in the Sixth District while Governor Hogan over-performed as compared to statewide results). Similarly, nothing in the plaintiffs' showing considers the voting preferences of the 20.8% of registered voters who were affiliated with neither political party. *Id.* at 809; ECF 186-41 at 48:5-6. The inability of the Republican candidate to attract enough unaffiliated voters to prevail in the Sixth District congressional races in 2012, 2014, and 2016 does not necessarily mean that the result would have been the same if the Republicans had fielded a different candidate or if the same Republican candidates had faced a less attractive candidate in the general election. In all three of the elections under the 2011 redistricting plan, the Democratic nominee was John Delaney, a

well-financed, well-organized candidate, whose moderate views appealed to independent voters and even some Republicans. ECF 186-8 (Lichtman) at 37; ECF 186-2 (O'Malley Dep.) at 26:7-11, 29:11-16, 8311-20. His success could have occurred because Democrats, Republicans, and unaffiliated voters alike preferred his policy positions to those of his opponent, and plaintiffs have presented no proof or analysis to the contrary.

What the plaintiffs have presented here falls well short of the historic crossover and polarization analyses usually consulted in cases brought under Section 2 of the Voting Rights Act. *See Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Those analyses provide statistical evidence of electoral possibilities in certain geographic areas, including the residences of plaintiffs, which is, as *Gill* has recapitulated, a central requirement for any gerrymandering claim. It is only through establishing the local political conditions that any alleged burden can be evaluated. For example, if a Republican candidate is capable of succeeding in the Sixth District (as gubernatorial candidate Larry Hogan was), that ability to succeed bears directly on whether or not plaintiffs have suffered any individual burden to their vote different from the circumstance of any other individual who resides in a district where the views of her neighbors render it difficult for her to elect her candidate of choice. Plaintiffs have simply not produced any analysis that would yield answers to these questions and therefore their claim may not proceed further.

3. Plaintiffs Have Not Established That Their Alternative Map Is a Neutral Alternative.

Plaintiffs' remaining evidence about the political composition of the Sixth District is similarly not probative of any identifiable burden on an individual's vote. Plaintiffs' expert, Dr. Michael McDonald, opined that the new Sixth District map "'has the effect of diminishing the ability of registered Republican voters to elect candidates of their choice compared to the previous, benchmark district.'" ECF 177-1 at 21 (quoting ECF 177-19, Ex. Q). But that statement does not to [*sic*] establish standing because it is equally applicable to any voter reassigned from a district in which she supports the successful candidate to one in which she supports the unsuccessful candidate. As Dr. McDonald went on to explain, the "concrete impact" plaintiffs have alleged and sought to prove is merely that Republican voters have "been unable to elect a candidate of their choice." ECF 177-1 at 21-22 (quoting ECF 177-19, Ex. Q). But many other voters throughout Maryland are also unable to elect a candidate of their choice, and in some instances that inability newly arose after the adoption of the 2011 plan. Notable examples include Republicans moved out of the First District and Democrats moved into the First District. Plaintiffs have proposed no threshold, given no mathematical explanation, nor even proffered qualitative reasoning for why the type of dilutive injury they assert is anything other than a "generally available grievance about government," *Gill*, 138 S. Ct. at 1923, one that occurs to

many people in every redistricting undertaken by a state with two-party representation in Congress.

Gill recognized these difficulties in establishing the burden on an individual vote, and offered that the vote dilution "harm arises from the particular composition of the voter's own district, which causes his vote . . . to carry less weight than it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931. Justice Kagan, in her concurrence, clarified that such a comparison district must be "neutrally drawn." *Id.* at 1936. The need to provide both such a neutral comparator and a standard for measuring deviation is especially acute in addressing partisan gerrymandering claims where, as here, the alleged injury-in-fact is vote dilution, because there is no actual numerical dilution in absolute terms as was present in *Baker v. Carr* and its progeny. Some extra factor is needed to establish that there has been an injury.

The need for a neutral comparator and some standard for deviating from that comparator distinguishes the level of proof necessary in a partisan gerrymandering claim from what is deemed sufficient to establish standing in racial gerrymandering cases. Modern gerrymandering cases articulate the injury-in-fact as "being 'personally . . . subjected to [a] racial classification,'" *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996) (principal opinion of O'Connor, J.)), and "being represented by a legislator who believes his 'primary obligation is to represent only the members' of a particular racial group." *Id.*

(quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (*Shaw I*)). In those cases, the harm is not relational; rather, the placement of the district lines *is* the harm and the necessary proof consists of evidence about that placement. *Alabama Legislative Black Caucus*, 135 S. Ct. at 1267. There, the Court found sufficient plaintiff's evidence on standing when they "referred to the specific splitting of precinct and county lines in the drawing of many majority-minority districts; and they pointed to much district-specific evidence," *id.*, which included the historic and specific electoral circumstances related to specific districts and comparisons with plans that would not have inflicted the same stigmatic harm on plaintiffs. Alabama Legislative Black Caucus Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law, Doc. 194 at 30-36, *Alabama Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285 (M.D. Ala. Aug. 8, 2013) (No. 12-1081).

Plaintiffs here have not produced nearly the level of district-specific evidence produced by plaintiffs in *Alabama Legislative Black Caucus*. For example, the *Benisek* plaintiffs have produced no evidence and offered no explanation for the placement of any specific boundary of the Sixth District, or what consequence that had for any individual's right to vote. The incompleteness of plaintiffs' showing is clear from their presentation of a singular alternative Sixth District. Dr. McDonald, the expert who opined on the alternative district, could not testify that his aid [*sic*] did not use political history or voter registration data in drawing the alternative District. ECF 186-41 at 59:18-60:18.

Instead, Dr. McDonald highlights the fact that the alternative District packs Montgomery County Democrats into the alternative Eighth District by assigning all the major urban areas in Montgomery County to the alternative Eighth District. ECF 186-19 at 27 (Figure 9). Dr. McDonald even admitted that, under his proposed alternative map "[t]he Democratic voters that were formerly within the Eighth District would have their ability to elect a candidate of their choice diminished[.]" ECF 186-41 (Michael McDonald Dep.) at 62:21-63:2. And Dr. McDonald did not include any information about the alternative Eighth District, and thus did not explain splits in voting tabulation districts or census places. ECF 186-19 at 16-17; 186-41 at 61:10-13. Therefore, plaintiffs have failed to produce evidence sufficient to prove that their alternative district would conform to traditional redistricting principles even as well as the district it seeks to replace. Plaintiffs have provided no evidence that their alternative district is "neutrally drawn." *Id.* at 1936 (Kagan, J., concurring). Even if neutrality of the hypothetical district were not required to establish injury-in-fact, the generalized nature of the plaintiffs' grievance is made obvious by their admission that their proposed alternative district affects many other non-plaintiff individuals in a manner indistinguishable from the plaintiffs' alleged injury.

B. Plaintiffs Have Not Produced Evidence of Any Non-Dilution Injury.

Throughout this litigation, including the briefing on cross-motions for summary judgment, plaintiffs have eschewed any need to establish any injury-in-fact to their First Amendment rights, other than vote dilution. ECF 177-1 at 23; ECF 191 at 18-19. Indeed, this Court may proceed to resolve the cross-motions for summary judgment on the understanding that plaintiffs' asserted injury-in-fact is vote dilution, in light of plaintiffs' representation in the recently-filed joint status report that "[t]he motions are fully briefed and ripe for decision." ECF 209 at 1.

Plaintiffs should not be permitted to change their tack now, at this late juncture in litigation that the Supreme Court has found to be plagued by "plaintiffs' unnecessary, years-long delay. . . ." *Benisek II*, 138 S. Ct. at 1944. For example, plaintiffs might be tempted to alter their arguments to take advantage of Justice Kagan's *Gill* concurrence suggesting that an "associational harm" could potentially occur as the result of a partisan gerrymander, a harm that is "distinct from vote dilution." *Gill*, 138 S. Ct. at 1938 (Kagan J., concurring). That attempt would be unsuccessful because plaintiffs have failed to point to any burden on their *individual* expressive rights. Plaintiffs have produced no evidence of any non-dilution injuries to their associational rights, like those at issue in *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983). There the Court found an election law caused an injury when it made "[v]olunteers . . . more difficult to recruit and retain, media

publicity and campaign contributions . . . more difficult to secure, and voters . . . less interested in the campaign." *Id.* The plaintiffs' evidence here falls far short of that showing.

Plaintiffs principally rely on two plaintiffs' testimony about what other residents of the Sixth District told them when they were canvassing, ECF 177-1 at 23-24. Such anecdotal, hearsay testimony cannot be admitted at trial and, therefore, may not be considered on a summary judgment motion. *Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991); *see also Whittaker v. Morgan State Univ.*, 524 F. App'x 58, 60 (4th Cir. 2013) (unpublished) (material in the record cannot be used to support summary judgment if it "cannot be presented in a form that would be admissible in evidence") (quoting Fed. R. Civ. P. 56(c)(2)). The only direct testimony plaintiffs have identified on this subject is that of Ned Cueman, who stated only that he was "disoriented or felt disconnected" and that he had "no connection" with parts of the district that were outside his own county, ECF 177-1 at 24 (quoting ECF 177-55 at 36:14-37:2). But those subjective feelings demonstrate no burden on objective expressive rights, especially when viewed in light of the most telling indicator of political engagement: Mr. Cueman continued to vote regularly after the redistricting. ECF 186-25 (Cueman) at 15:10-16. The objective evidence demonstrates that Republican engagement in the five counties included in their entirety within the former Sixth District has increased since formation of the newly competitive Sixth District.

From 2010 to 2016, Republican voter registration increased in each year in Allegany, Carroll, Frederick, Garrett, and Washington Counties. ECF 186-50 at 2-6. In each of these counties, turnout among Republicans also increased in absolute terms between the presidential election year of 2008 and the presidential election year of 2012. ECF 186-51 at 2. And, although turnout was down across-the-board in the 2014 gubernatorial election compared to the 2010 election, Republican turnout in the Sixth District outpaced Democratic turnout. ECF 186-51 at 3. Consistent with the objective general election data showing Republican voter engagement, all of the plaintiffs voted regularly after the 2011 redistricting. ECF 186-20 (Strine) at 11:22-12:10; 186-43 (DeWolf) at 10:16-18; ECF 186-44 (O'Connor) at 13:15-17; ECF 186-25 (Cueman) at 15:10-16; ECF 186-24 (Eyler) at 11:6-12; ECF 186-45 (Ropp) at 18:12-18; ECF 186-36 (Benisek) at 12:15-17. It is true that these unimpeded efforts to vote failed to secure victory for plaintiffs' preferred candidates, but that lack of success reflected the voting preferences of their fellow citizens, not only as to the winning candidates but also as to the district map itself. That is, the 2011 redistricting plan won voters' approval in 10 of the 12 counties where registered Republicans outnumbered registered Democrats, *see* ECF 104, ¶ 39, including three counties located within the present and former boundaries of the Sixth District: Allegany, Washington, and Frederick Counties, ECF 186-50 at 4. Only Carroll and Garrett Counties voted to reject the map. ECF 104 at ¶ 39.

Common Cause v. Rucho once again supplies an interesting point of contrast and comparison. There the three-judge court made findings of fact with regard to multiple first-hand accounts establishing the types of associational injuries at issue in *Anderson v. Celebrezze*. 279 F. Supp. 3d at 615-16. Nevertheless, the Court instructed the three-judge court to reconsider the issue of standing in light of *Gill*. Therefore, in the wake of *Gill*, it is unclear whether, when vote dilution is the asserted injury, evidence of associational harm could serve as a substitute for the requisite demonstration that dilution has burdened an individual vote.

II. The Reasoning in *Benisek II* Bars Plaintiffs' Claims for Permanent Injunctive and Declaratory Relief.

"An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). This is as true for permanent injunctions as it is for preliminary injunctions. Like preliminary injunctions, permanent injunctions are governed by "the four-factor test historically employed by courts of equity." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006). To satisfy that test, a plaintiff must show that (1) "it has suffered an irreparable injury"; (2) "remedies available at law, such as monetary damages, are inadequate to compensate for that injury"; (3) "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted"; and (4) "the public interest would not be

disserved by a permanent injunction." *Id.* at 391. "Satisfying these four factors is a high bar, as it should be." *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (4th Cir. 2017).

In considering this Court's opinion denying plaintiffs' request for preliminary injunction, the Supreme Court, in a per curiam opinion, emphasized that "[a]s a matter of equitable discretion," success on the merits of a claim does not automatically entitle plaintiffs to injunctive relief "as a matter of course." *Benisek II*, 138 S. Ct. at 1943. "Rather, a court must also consider" the equitable factors at issue when injunctive relief is requested: (1) irreparable harm; (2) balance of the equities; and (3) that the requested injunctive relief is in the public interest. *Id.* at 1943-44. As the Supreme Court concluded, "Plaintiffs made no such showing below." *Id.* at 1944. Plaintiffs not only failed to make such a showing in relation to their request for preliminary relief; they have also failed to do so in support of their request for permanent injunctive relief.

A. Plaintiffs Have Demonstrated No Irreparable Harm Because the Sixth District Remains Competitive and Electoral Circumstances Have Changed.

As for the first factor, irreparable harm is "a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *see also Raub v. Campbell*, 785

F.3d 876, 885-86 (4th Cir. 2015). Here, the harm asserted by plaintiffs is an ill-defined vote-dilution injury, which is not a concrete injury-in-fact under this Court's previous holding absent proof of actual impact on real election results. ECF 202 at 17-21. The Court has found that the record, and most particularly Congressman Delaney's near defeat in 2014, "raises serious doubts about whether Plaintiffs' alleged injury is likely to recur." *Benisek I*, 266 F. Supp. 3d at 813. The potential for recurrence has grown ever more doubtful in light of Congressman Delaney's decision not to seek reelection and the Maryland Republican Party chair's pronouncement that the Sixth District "is a winnable race" for the Republican candidate in 2018.[2] Under these circumstances, the Court should exercise extreme caution in considering plaintiffs' request for permanent injunctive relief. "Injunctions by their nature attempt to anticipate the future, but the future sometimes declines stubbornly to be prophesied." *SAS Inst., Inc.*, 874 F.3d at 385.

The "serious doubts" the Court has expressed about plaintiffs' claim of injury, *Benisek I*, 266 F. Supp. 3d at 813, are warranted not only because "Congressman Delaney nearly lost control of his seat in 2014 in a race against a candidate burdened with undisputed geographic and financial limitations," *id.*, but also in light of other electoral results in the Sixth District. For example, "Democrat Ben Cardin carried the Sixth

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[2] Josh Hicks, *Maryland Politics: Republican Outside Groups Take a Rare Interest in Deep-Blue Maryland*, Wash. Post, Jan. 12, 2018.

District by just 50% of the vote, despite winning 56% of the vote statewide" and "in 2014, Republican gubernatorial candidate Larry Hogan won 56% of the vote in the Sixth District, besting his Democratic rival by 14 percentage points." *Id.* at 810.

The 2018 general election will pit newcomer Democratic candidate David Trone against Republican candidate Amie Hoeber. Plaintiffs have put forward no evidence about their own preferences in that race, nor have they offered any evidence that those preferences will be frustrated. Such evidence is particularly important where several of the plaintiffs have expressed support for Democratic candidates in the past. ECF 186-24 (Charles Eyler Dep.) at 15-17; *see also* ECF 186-25 (Ned Cueman Dep.) at 17; ECF 186-20 (Strine Dep.) at 14. Even Ms. Hoeber, the Republican nominee, has described herself as "independent" and "not an automatic partisan."[3]

Because irreparable injury is an element of plaintiffs' claim for injunctive relief, plaintiffs bear the burden of production on this element. *See Ricci*, 557 U.S. at 586. They have failed to carry that burden with the evidence they have produced, and they have declined the Court's invitation to reopen discovery. *See* ECF 209

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[3] Jeff Barker, *Republican Amie Hoeber and Democrat David Trone to face off for Maryland's only open House seat,"* Balt. Sun, June 26, 2018, available at http://www.baltimoresun.com/news/maryland/politics/bs-md-congress-20180626-story.html (last visited July 12, 2018).

at 1. Therefore, summary judgment should be granted in defendants' favor.

B. Plaintiffs' "Unnecessary, Years-Long Delay" Precludes Any Remedy in Equity, Not Just Preliminary Injunction.

A permanent injunction may not issue unless a court concludes, "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted." *eBay Inc.*, 547 U.S. at 391. "[R]easonable diligence" is a precondition "to call into action the powers of the court." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (quoting *McKnight v. Taylor*, 1 How. 161, 168 (1843). Before equitable relief may be granted, the court must answer "whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair." *Id.* Lack of diligence "exists where 'the plaintiff delayed inexcusably or unreasonably in filing suit.'" *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) (quoting *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 318 (D.C. Cir. 1987)).

The plaintiffs here did not "show reasonable diligence" in requesting a preliminary injunction. *Benisek II*, 138 S. Ct. at 1944. The findings supporting that conclusion apply equally to plaintiffs' request for permanent injunctive relief. First, "[a]lthough one of the seven plaintiffs . . . filed a complaint in 2013 alleging that Maryland's congressional map was an unconstitutional gerrymander, that initial complaint did not present the retaliation theory asserted here." *Id.* Second,

the "newly presented claims" required, beginning in 2016 and at plaintiffs' own insistence, "discovery into the motives of the officials who produced the 2011 congressional map." *Id.* Third, "plaintiffs' unnecessary years-long delay in asking for preliminary injunctive relief," *id.*, now has caused additional delay in their pursuit of permanent injunctive relief. Instead of "six years, and three general elections, after the 2011 map was adopted, and over three years since the plaintiffs' first complaint was filed," *id.*, plaintiffs currently press their claim for permanent injunctive relief seven years, and three general and one primary election, after the 2011 map was adopted and nearly five years since the original complaint was filed. Because any deadline to "ensure the timely completion of a new districting scheme in advance of the 2018 election season" has "long since passed," *id.* at 1945, plaintiffs now are seeking permanent court intervention with only the 2020 election remaining in the redistricting cycle.

"[A] challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored." *White*, 909 F.2d at 103. In *White*, the Fourth Circuit looked back at two of its cases where, in holding injunctive relief unavailable, the Court had "found significant the nearness to the next census and resulting reapportionment." *White*, 909 F.2d at 103 (examining *Maryland Citizens for a Representative Gen. Assembly v. Governor*, 429 F.2d 606 (4th Cir. 1970), and *Simkins v. Gressette*, 631 F.2d 287 (4th Cir. 1980)). The significance of impending reapportionment is partly that "there is large potential

for disruption in reapportioning with undue frequency." *Id.* at 104. Because the 2020 Census results likely will require significant population-based reapportionment, any injunctive relief here would require two successive reapportionments in two successive years. As *White* concluded, "two reapportionments within a short period of two years would greatly prejudice . . . citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens." 909 F.2d at 104.

Plaintiffs' "unnecessary, years-long delay," *Benisek II*, 138 S. Ct. at 1945, has also prejudiced the defendants within this litigation. The plaintiffs' "newly presented claims . . . required discovery into the motives of the officials who produced the 2011 map," *id.*, many of whom could not recall the events of nearly six years ago or the sources of data they considered. *See, e.g.*, ECF 186-13 (Miller) at 20-21, 115-17, 136-37; 186-46 (Busch) at 146:12-16; 186-5 (Hitchcock) at 123:16-20. And plaintiffs have sought to turn those fading memories to their advantage. ECF 177-1 at 5. Moreover, because plaintiffs' delay allowed a new gubernatorial administration to take office before they asserted their motive-based claims, neither the prior administration nor the incoming administration had notice of a need to institute a litigation hold to preserve records during the transition. As a result of the administration turnover, many State officials and employees involved in redistricting left State service prior to plaintiffs' filing of their second amended complaint in March 2016, and long before anyone could perceive that documents

other than the 2011 Plan might be relevant. These intervening events prejudiced the State's ability to defend this lawsuit, prejudice that has been exacerbated by plaintiffs' pursuit of frivolous spoliation claims and accusations of discovery misconduct. ECF 153-1.

"[E]quity ministers to the vigilant, not to those who sleep upon their rights." *Perry v. Judd*, 471 F. App'x 219, 224 (4th Cir. 2012) (unpublished) (quoting *Texaco P.R., Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 879 (1st Cir. 1995). This is as true in cases alleging First Amendment injury as in others. *Perry v. Judd*, 840 F. Supp. 2d 945, 953 (E.D. Va. 2012), *aff'd*, 471 F. App'x 219 (4th Cir. 2012) (laches can serve as a defense to First Amendment claims). Where "delay largely arose from a circumstance within plaintiffs' control: namely, their failure to plead the claims giving rise to their request for . . . relief until 2016," *Benisek II*, 138 S. Ct. 1944, resulting in the risk of substantial disruption of back-to-back reapportionments, the equities tip in favor of denying injunctive relief.

C. The Public Interest Would Be Harmed by Replacing a Voter-Approved Plan with a Court-Ordered Plan That Comes Too Late for Referendum Vote.

"'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v.*

Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Here that injury is acute because it would countermand a choice made directly by the people of Maryland. Although some time remains before the 2020 elections, as discussed above, too-frequent redistricting undermines "the need for stability and continuity in the organization of the legislative system." *Reynolds*, 377 U.S. at 583. And in states like Maryland that allow voters to approve or reject redistricting plans, reapportionment too near the end of a decennial census period risks depriving the people of an opportunity to ensure that politicians do not "entrench themselves in power against the people's will." *Gill*, 138 S. Ct. at 1935 (Kagan, J., concurring). The Maryland redistricting process cannot play itself out in full in the remaining time before decennial redistricting because a referendum could not appear on the ballot until the 2020 general election, the only election to occur under any new plan. Thus, any reapportionment ordered by this Court would replace a redistricting plan the people of Maryland have already overwhelmingly approved (majorities in 22 of Maryland's 24 counties, including a majority of voters in Allegany, Washington, and Frederick Counties, all of which were within the former Sixth District, ECF 186-8 at 31) with one that the people will have no effective opportunity to approve or reject directly.

"'[T]he true principle of a republic is, that the people should choose whom they please to govern them.'" *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2675 (2015) (citation

omitted). Direct voter participation through referendum serves "to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be 'chosen . . . by the People of the several States.'" *Id.* To replace a plan that was endorsed by 64.1% of Marylanders who voted on the question, after opportunity for public debate, with a court-ordered map with no opportunity for the people to directly approve may pose "serious First Amendment implications" of its own. *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637 (2014) (Kennedy, J., plurality op.). Though plaintiffs have sought to denigrate the legitimacy of the referendum, "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.*

Here, the public has voted overwhelmingly in favor of the 2011 redistricting plan. Replacing the plan without an effective opportunity for the public to approve or disapprove the plan is against the public interest.

III. *Mt. Healthy* Applies Only Where the Causal Chain Is One Actor Long.

During the pendency of the appeal in this case, the Supreme Court decided a case presenting the question of the proper standard for causation in a retaliatory arrest case. *Lozman*, 138 S. Ct. 1945. In holding that

"*Mt. Healthy* provides the correct standard for assessing a retaliatory arrest claim" for Mr. Lozman's claim only, the Court emphasized the particular factual circumstances of Mr. Lozman's arrest and the nature of his claims. *Id.* at 1955. The Court pointed out that he alleged that "the City, through its legislators, formed a premeditated plan" of retaliation *and* "the City itself, through the same high officers, executed that plan by ordering his arrest at the November 2006 city council meeting." *Id.* The Court noted that Mr. Lozman had not sued the officer who had made the arrest, and further noted that he "likely could not have maintained a retaliation claim against the arresting officer in these circumstances," namely, that "the officer appears to have acted in good faith, and there is no showing that the officer had any knowledge of Lozman's prior speech or any motive to arrest him for his earlier expressive activities." *Id.* The facts and allegations in *Lozman* stand in stark contrast to plaintiffs' claims in this case.

Lozman supports this Court's decision not "to import into the political gerrymandering context the [*Mt. Healthy*] burden-shifting framework." *Benisek I*, 266 F. Supp. 3d at 811 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). "[P]roving the link between the" non-defendant actor's "retaliatory animus and the plaintiff's injury" is "'more complex than'" it is "'in other retaliation cases.'" *Lozman*, 138 S. Ct. at 1953 (quoting *Hartman v. Moore*, 547 U.S. 250, 261 (2006)). Here, "the causal connection required . . . is not merely between the retaliatory animus of one

person and that person's own injurious action," or even "between the retaliatory animus of one person and the action of another," as in *Hartman*. *Id.* at 262. Instead, the plaintiffs' claim presents the far more complex and "particularly attenuated causation," *Reichle v. Howards*, 566 U.S. 658, 667 (2012), between retaliatory *animus* attributed to multiple actors involved in the redistricting process, and the separate *actions* (plural) of the legislators who enacted the legislation and the more than 1.5 million voters who approved the legislation in the referendum, as well as, ultimately, the thousands of Sixth District voters who voted for congressional candidates. Moreover, the defendants sued here are not the actors alleged to have made the allegedly retaliatory decision. Those actors, most notably Governor O'Malley and the legislators, are entitled to absolute legislative immunity from suit for their legislative acts. *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 299, 300-01 (D. Md. 1992) (three judge court) (holding that governor and legislators were entitled to absolute legislative immunity for their roles in redistricting). And, as *Lozman* reiterated, "*Hartman* relied in part on the fact that, in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision to prosecute is weakened by 'the presumption of regularity accorded to prosecutorial decisionmaking.'" *Lozman*, 138 S. Ct. at 1953 (quoting *Hartman*, 547 U.S. at 263). Here, the challenged redistricting legislation is subject to another "long-standing presumption": the general "presumption of validity" accorded a State's legislation, absent "invidious discrimination" based on

"racial criteria" or "other immutable human attributes," which this case does not involve. *Parham v. Hughes*, 441 U.S. 347, 351 (1979); *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 807, 808 (1969) (applying presumption of validity in equal protection challenge to a State's absentee voting law involving alleged infringement of "fundamental right" to vote).

Lozman clarifies that *Mt. Healthy* is meant to apply only to retaliation cases where the asserted retaliation and injury are closely connected and stem from a single actor. Redistricting, with its multiple actors, does not present that scenario. Here, the approval of the 2011 plan by 1.5 million Marylanders even further attenuates the causal chain.

CONCLUSION

Defendants' cross-motion for summary judgment should be granted and judgment entered in favor of the defendants on all counts.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THREE-JUDGE COURT

O. JOHN BENISEK *et al.*,	*	
Plaintiffs	*	
	*	**CIVIL NO.**
v.	*	**JKB-13-3233**
LINDA H. LAMONE *et al.*,	*	
Defendants	*	

* *

ORDER

(Filed Aug. 30, 2018)

Pending before the Court are Plaintiffs' motion for summary judgment[1] (ECF No. 177) and Defendants' cross-motion for summary judgment (ECF No. 186). These matters will come before the Court during a hearing on **October 4, 2018**, beginning at **10:00 a.m.** and concluding that same day (with appropriate recesses), all in **Courtroom 7C**, United States Courthouse, Baltimore. Maryland, at which time and place the parties may present oral argument.

Judges Niemeyer and Russell join in the entry of this order.

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[1] The portion of that motion requesting preliminary injunctive relief and expedited trial on the merits was denied in an earlier order. (ECF Nos. 202, 208.)

DATED this 29 day of August, 2018.

BY THE COURT:

/s/ James K. Bredar
James K. Bredar
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE *et al.*,	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

MOTION TO EXCLUDE PORTIONS OF THE DECLARATION OF MICAH D. STEIN IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL SUMMARY JUDGMENT BRIEF AND RELATED MATERIAL

For the reasons stated in the accompanying memorandum, the Defendants, Linda H. Lamone, State Administrator of Elections, and David J. McManus, Jr., Chair, State Board of Elections, move under Federal Rules of Civil Procedure 7(b) and 56(c)(2), (4), to exclude from the Court's consideration portions of the declaration of plaintiffs' attorney Micah D. Stein, ECF 210-3, to the extent it contains (1) facts not otherwise in the record that are not subject to judicial notice under Rule 201 of the Federal Rules of Evidence and (2) Mr. Stein's own analyses of data, which constitute lay opinions that would be inadmissible under Rule 702. The Court should similarly exclude references to those same facts and opinions in plaintiffs' supplemental

memorandum in support of their motion for summary judgment, ECF 210.

A proposed order is attached.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK et al.,	*	
	*	
Plaintiffs,	*	
	*	**CIVIL NO.**
v.	*	**JKB-13-3233**
	*	
LINDA H. LAMONE et al.,	*	
	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

ORDER

(Filed Oct. 2, 2018)

Defendants move, ECF No. 215, to exclude portions of the Declaration of Micah Stein in Support of Plaintiffs' Supplemental Summary Judgment Brief, claiming that (1) the attached campaign finance reports are not capable of being admitted at trial, *see* Fed. R. Civ. P. 56 (c)(2), and (2) Mr. Stein's collective analysis constitutes inadmissible lay opinions, *see* Fed. R. Evid. 702. We note that, in a bench trial, certain rules of evidence are relaxed because the rules assume that a trial judge is able to weigh the evidence, avoid improper inferences, and, if it becomes necessary, strike any inadmissible evidence. *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994); *see United States v. Wood*, 741 F.3d 417, 425 (4th Cir. 2013) ("[B]ecause the district court was also the trier of facts, the district court's evidentiary gatekeeping function was relaxed, and the district court was in the best position to decide the proper weight to give the expert opinions."); *see also In re*

Salem, 465 F.3d 767, 777 (7th Cir. 2006) ("[W]here the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702."); *United States v. Brown*, 415 F.3d 1257, 1268–69 (11th Cir. 2005) ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."); *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999) (noting that judges must determine the admissibility of expert testimony to avoid "dumping a barrage of questionable scientific evidence on a jury"). Because a panel of judges will hear the issues in this case, there is no need to exclude the declaration at this point. If determined to be problematic, the Court can simply strike the evidence later.

For the reasons set forth above, it is hereby ORDERED:

Defendants' Motion to Exclude Portions of the Declaration of Micah D. Stein is DENIED.

Judge Russell joins in this Order.

Judge Niemeyer would defer ruling until during the hearing on October 4, 2018.

DATED this 2 day of October, 2018.

BY THE COURT:

/s/ James K. Bredar
James K. Bredar
Chief Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MARYLAND

O. JOHN BENISEK, et al.	)	
Plaintiff [*sic*],	)	
vs.	)	CIVIL NO.: JKB-13-3233
LINDA H. LAMONE, et al,	)	
Defendant [*sic*].	)	

Transcript of Proceedings
Before the Honorable Paul V. Niemeyer
the Honorable James K. Bredar the Honorable
George Levi Russell, III
Thursday, October 4th, 2018
Baltimore, Maryland

* * *

[2] PROCEEDINGS

JUDGE NIEMEYER: Be seated, please. All right. This morning we've got the case of Benisek versus Lamone. And we're on cross motions for summary judgment. And I think it best that we start out with the plaintiffs. They filed a motion for summary judgment. And then the State has filed a cross motion for summary judgment. And we've received your papers. We've read your papers, studied them. And so we're ready to hear you out now.

Mr. Kimberly.

MR. KIMBERLY: Thank you, Your Honor. It's good to be back. So I think –

JUDGE BREDAR: Mr. Kimberly, have you tried to settle this case?

MR. KIMBERLY: No, Your Honor. We have not attempted to settle.

JUDGE BREDAR: If the plaintiffs were able to achieve, through a settlement, the creation of a non-partisan commission in Maryland that would be responsible for drawing the lines going forward, that would meet all of the requirements and complaints that your clients have presented to the Court; wouldn't it?

MR. KIMBERLY: Well, it certainly would, Your Honor. There's certainly no impediment from our perspective to a willingness to settle. We've simply read into the fairly [3] steadfast opposition to our position on the part of the office of the Attorney General that that's not something that's on the table from their perspective, but you'll have to ask them.

JUDGE BREDAR: And the United States Supreme Court has endorsed the lawfulness of such commissions, they did so expressly in the Arizona case; true?

MR. KIMBERLY: True. We would be very pleased to see that development. Unfortunately, because it's a development that requires legislation, it's not one that I think we can compel by settlement. So it's something that I think would fall to the State to undertake. I think if such a commission were formed

and it redrew the present map, that's a process we'd be happy to be involved in and it may well moot our case, but we haven't certainly been given any suggestion that that's something that the State Legislature or the Governor's Office is considering.

JUDGE BREDAR: So you're completely open to it, but you need to see some indication from your opponent, the State of Maryland, that they would similarly be open to at least a dialogue around the possibility of a settlement. Of course, it's not for the Court to dictate what those terms would be, but that's one possibility.

MR. KIMBERLY: I guess the way that I view it, Your Honor, is that I'm doubtful, in fact, that it could be [4] accomplished via a settlement, I think what it might be is intervening conduct that ends the conduct complained of. But our settlement, at least vis-a-vis this lawsuit, would have to be with the State Board of Elections and its leaders.

JUDGE NIEMEYER: Why couldn't it be a consent order by the Court?

MR. KIMBERLY: It could be a consent order or much like the sort –

JUDGE NIEMEYER: I mean, to take it out of the political process. In other words, the commission would be an adjunct of the Court, and the parties would participate and it would be done by consent order in the context of this case, as opposed to having to

go back to the legislature. That's just a thought, spontaneous.

MR. KIMBERLY: I appreciate that, Your Honor. And if there were such a consent order that indicated that the State would not enforce the map as drawn, and instead would enact or promulgate a map neutrally drawn –

JUDGE NIEMEYER: We might make findings in the consent order and have the agreed upon – the commission lines, if they were changed, adopted as part of the Court's order directing that it govern the next election.

MR. KIMBERLY: I think that would – presuming the lines of that map were consistent with our legal theory, and I gather –

[5] JUDGE NIEMEYER: Well, that would be something for that little commission and you guys to work out if that were the course that we were going on. But probably you have a lot more flexibility than the state. The State would have to consider something like that too, at some length. And I think these inquiries or suggestions are not efforts to push one direction or the other, these are just ideas to get around hurdles.

MR. KIMBERLY: I appreciate that and I would say we are indifferent to – our goal is reaching an end result where we have a neutrally drafted map. We're indifferent to the means of getting there. If it's a permanent injunction, that would be great. If it's a consent order or some settlement by which the State

agrees to conduct elections under a neutrally drawn map, we would be perfectly happy with that outcome as well. Judge Niemeyer, as you suggest, I think the real question as it concerns any of those alternative approaches rests with my friends on the other side. And the State –

JUDGE NIEMEYER: Well, it takes two to tango. It just means one may have to take the lead.

MR. KIMBERLY: Well, and I leave them to make the argument. I think it is also a question of whether it would have to be done by legislation or not, but maybe through something like a consent –

JUDGE NIEMEYER: Why would that be done by [6] legislation if it's before the Court now on a constitutional issue? In other words, it's a political question initially. The requirements are shared by the State and the Congress in drawing these lines. But the Courts are involved through arguments that the lines that that process yielded violated the Constitution. So there would have to be some basis for the Court to keep something like that. And we recognize that too.

The difficulty of saying the legislature has to pass it, we can't dictate how the legislature would vote, number one. And No. 2 the process probably becomes indeterminate and we might find ourselves back at this –

MR. KIMBERLY: That's right.

JUDGE BREDAR: – at the gate again, because there have been efforts in the past to do

something like that voluntarily. The idea might be to have a court orchestrate a settlement through –

MR. KIMBERLY: Certainly.

JUDGE BREDAR: – through a court-created commission and an approval with a consent order.

But any way that's just – these are just ideas. And I don't know if Judge Bredar had any other ways that he was talking about it, but it sounds appetizing if both parties were willing.

MR. KIMBERLY: Certainly. And I'll confess not to [7] having given a lot of thought to a question of a consent decree. But as I say, our ultimate objective is ends-oriented not means-oriented. And if there's another way of getting there apart from a permanent injunction, we would certainly be happy to entertain that possibility.

JUDGE BREDAR: So, Mr. Kimberly, I appreciate your implicit acknowledgment that it's probably an easier call on your side than it is on the other side. But by virtue of the Court raising it with you, we provide your opponents the opportunity to reflect for a few minutes on their answer to what is probably a much more complex question.

MR. KIMBERLY: Certainly. Well, while they think about that, if it's all right with –

JUDGE NIEMEYER: Why don't you turn to your motion.

MR. KIMBERLY: I'll proceed to my motion. What I'd like to do, Your Honors, is first lay out what it is we think that we have to show. And then I'm going to – well, why don't I start with this. So the three elements, according to this Court's decision on the motion to dismiss, is that we have to show specific intent to burden Republicans by reason of their party affiliation and past voting history; we have to show that the redistricting, in fact, resulted in vote dilution that was sufficiently significant that it actually caused a practical consequence in the way that the electoral [8] machinery works; and finally, we have to show that the vote dilution would not have come about absent the protected conduct and the intent to burden that conduct. And we submit we've proved all three elements.

Last time we were here on the preliminary injunction motion, we started out with a discussion of specific intent. And the Court moved fairly quickly away from that. What I'd like to do is just give a very brief sort of three minute highlight reel of specific intent. And then I'm certainly happy to answer any questions that the Court may have on that, but I don't intend to dwell especially long on the question of intent.

Throughout our briefing I think we – and throughout the record we've demonstrated that the goal in the 2011 redistricting was to move from a 6-2 map to a 7-1 map. Here for example is Eric Hawkins the NCEC analyst, who consulted on the map drawing who confirmed this intent.

(Video played.)

MR. KIMBERLY: That evidence does not stand on its own. Later in his deposition, Mr. Hawkins confirmed again that they were going to create a quote, "7-1 split," in their approach to the redistricting in 2011. This was corroborated in turn by many other members of the redistricting actors in the redistricting process, including here Curt Anderson who's giving a press interview after having been briefed on the [9] redistricting on October 17th, 2011.

(Video played.)

MR. KIMBERLY: So this confirms that the goal of the redistricting was to create a 7-1 map that gave Democrats an additional seat in the eight seat congressional delegation.

Now, as it turns out there were – because it was a 6-2 map, the map drawers could have targeted either the 1st District or the 6th District. Here Eric Hawkins, I'll spare you the video, but Eric Hawkins confirms that there were two districts you could look at based on what the line up was, he says. And so this presents a question whether the map drawers targeted the 1st District, which is predominantly Republican, or the 6th District, which is predominantly Republican.

And here is Martin O'Malley confirming in the course of his deposition that a decision was made to go for the 6th.

(Video played.)

MR. KIMBERLY: And what this reflects is a decision to crack the Republican majority in the 1st

District would have required drawing the 1st District in such a way that it jumped the Chesapeake Bay. The map drawers and others involved in the process had decided, for political reasons, that they didn't want to jump the Chesapeake Bay. And so as Governor O'Malley l re confirms, the decision, therefore, was made to go for the 6th.

And, finally, here is Governor O'Malley confirming [10] that his intent, indeed, as the leader of the redistricting process, was to make the 6th District more favorable for Democrats.

(Video played.)

MR. KIMBERLY: Now, we have quite a lot more than this. But as I mentioned, the last time that we were here the Court indicated that Your Honors didn't have extensive questions about the issue of intent. And Chief Judge Bredar, you even suggested that at that point that we have proven intent beyond – beyond the need for a trial. That is certainly our position and I stand ready to answer any questions –

JUDGE NIEMEYER: On that issue he seems to have had the affirmance of Justice Kagan.

MR. KIMBERLY: Certainly so. And obviously, there was some push back at the hearing before the Supreme Court, there was no push back on the question of intent, whatever other issues there may have been push back on. We think that the record here really does not present a genuine dispute as to the

objectives of those who were involved in the map drawing.

JUDGE BREDAR: Does the proof of intent with respect to voter dilution easily sort of slide over and also satisfy whatever proof obligation you have on intent with respect to your claim of associational injuries.

[11] MR. KIMBERLY: As in does proof of an intent to dilute offer proof of intent to impose those –

JUDGE BREDAR: Exactly.

MR. KIMBERLY: Yes, I think so. And it's because those associational harms really grow out of the vote dilution itself.

JUDGE BREDAR: Suppose, though, that we're not focusing on vote dilution ultimately, but on injuries that were sustained to associational rights that people have under the First Amendment, is the proof on intent that you've got in this record nonetheless sufficient to make out those claims as well?

MR. KIMBERLY: I would say so for two reasons. The first, and I'll get to this in greater depth when I start talking about the question of burden and injury, is our position is that those associational harms themselves, in fact, as I mentioned, grow out of vote dilution. But even if you didn't think of it that way and you thought of them as –

JUDGE BREDAR: I don't.

MR. KIMBERLY: – an independent injury, there's no question here that the intent was to make it more difficult for Republicans to win and easier for Democrats to win. And I would say even more than that, it was an intent to ensure that a Democrat wins the 6th Congressional District. And certainly one way to do that is to disrupt the associational activities [12] of Republicans by making it more difficult for them to recruit support to their party, by making it more difficult to get their base to turn out to elections, by making it more difficult to raise money, so on and so forth.

We have evidence in the record, which I'll get to in a little bit, showing just those kinds of harms. But I think more generally at the intent stage, the evidence here is that the intent was to make it a 7-1 district. And disrupting association is part of bringing about this objective.

So I think that's a segue to the question now of burden and intent. And as I say, I'm – I've come prepared to talk more about intent if Your Honors have any questions about that element, beyond Judge Bredar, what we just discussed.

For now what I'd like to do is move on to burden. And before getting to the evidence, I'd like to try to reorient the Court to the legal theory as we understand it, to what this Court had to say in its motion – in its opinion on the motion to dismiss as we understand it. The ultimate question on burden is not whether or not we have shown that every election has changed because [*sic*] the gerrymander. It is instead whether we

have shown a real and practical diminishment of political opportunity. That is what vote dilution is about. And that is, at least the principle theory of harm that we've put forward, although, as I say, I'll get to these associational harms as well.

[13] JUDGE RUSSELL: Isn't the associational harm easier to prove than the voter dilution?

MR. KIMBERLY: I think we have shown both beyond genuine dispute. I think both are quite clear on the record.

JUDGE RUSSELL: As a matter of law, though? We'll get to that in a moment, but as a matter of law you've shown the injury as opposed to the associational theory doesn't appear to be much of a dispute or it may not be much of a dispute that there were 10,000 voters that were taken from one district and placed in another district, with the intent to prevent them from associating with one another for the purposes of supporting a particular party.

MR. KIMBERLY: That, Your Honor, that sounds exactly right to me.

JUDGE RUSSELL: As opposed to winning or losing, establishing winning or losing –

MR. KIMBERLY: Certainly.

JUDGE RUSSELL: – by saying as a matter of law that there are voters out there that we're going to presume are voting in a – based upon a historical pattern and statistics are going to be voting in a

particular way. But the associational theory might be a little bit easier to prove because it's established by taking out a certain block of voters and replacing them with another block.

[14] MR. KIMBERLY: I think – I don't disagree with anything that you've said. I would say that these are two alternative paths.

JUDGE RUSSELL: Thanks.

MR. KIMBERLY: Thank you. I think these are two alternative paths to getting to the same place, which is just to show that the redistricting here had a real and practical impact on the First Amendment rights of Republicans in the old 6th Congressional District. We're certainly not giving up on the idea of vote dilution. And perhaps we can move to the question of –

JUDGE RUSSELL: I didn't mean to disrupt you, but I had a question as you were presenting your case, and – but I didn't want to disrupt your presentation.

MR. KIMBERLY: Well, I appreciate that, Your Honor. I guess what I would say – well, why don't I come back to the question of vote dilution.

JUDGE RUSSELL: That's fine.

MR. KIMBERLY: We have slides also on the associational injury. Let me talk briefly about that right now, the associational injury, as my colleague pulls up that slide. Sorry, just one moment, Your Honor.

JUDGE RUSSELL: Sorry, Mr. Kimberly, I threw you off and I apologize for that.

MR. KIMBERLY: That's okay. Your Honor, ultimately [15] my goal is to convince you. So I'm happy to respond to your questions.

So we – as I said, we have two parallel arguments here with respect to burden. And one is that there has been a chilled political participation and a disruption of that association. And I think at a certain level there is an intuitive element to this that doesn't require a whole lot of evidence or thought. Governor O'Malley put it succinctly in a speech that he gave at Boston College.

(Video played.)

MR. KIMBERLY: The idea that redistricting by cracking majorities, and attempting to rig elections by making it impossible, Judge Russell, as you said, for Republicans who are removed to continue associating with Republicans who remain, carves those individuals' voices effectively into irrelevance.

This is supported by Justice Kagan's opinion in *Gill against Whitford,* which we think is consistent with and very well supported by the Supreme Court's earlier decision in *Anderson against Celebrezze*. The idea behind this notion of burden is that partisan gerrymanders, and I'm quoting now, may infringe First Amendment rights held by parties, political organizations and their members, by making it more difficult for them to fund raise, to register voters, to attract

volunteers to generate support from independents and to [16] recruit candidates, good quality candidates to run for office.

That is reflective of what the Supreme Court said in *Anderson against Celebrezze,* which was a ballot access case, in which the Court explained, in effect, that what mattered was not necessarily whether the burden – and the burden in that case was different filing deadlines for independents versus members of the major political parties. And the Court did not focus there on whether that burden – what it recognized was a burden on a political opportunity had actually change [*sic*] an electoral outcome. What it focused on was the way it diminished political opportunity by disrupting this sort of association.

JUDGE BREDAR: And as a consequence, some of the justiciability issues that arise on the other prong are voided; right?

MR. KIMBERLY: Certainly so, Your Honor. Yes. And I'll come back to that in a little bit as well.

MR. KIMBERLY: Now the last time that we were here on the motion for the preliminary injunction, we had cited to testimony of our plaintiffs, who had testified that in their efforts to campaign in the 6th District they had run into exactly these sorts of effects.

Beyond that, we have actual voter turnout data. Now we have focused here on Republican primary turn out, because – for two reasons – in, I should say, midterm years, [17] for two reasons. One, it is in the

midterm years that the congressional candidate is at the top of the ticket and most likely to drive voters to the ballot box. And Republican primary elections are where Republicans, because Maryland has a closed primary system, only Republicans can participate, registered Republicans can participate in the election.

And what we see is in Allegheny [*sic*], Carroll, Frederick, Garrett and Washington Counties, all of which span the 6th District, turnout fell, for instance, in Allegheny [*sic*] from 42.77 percent, which I can say nationwide is an astronomical turnout for a midterm primary election, dropped by 15 points to 26.65. Every other county here dropped commensurately as well. The smallest drop was roughly a two percent drop, a six percent drop, but elsewhere other 15 percent drops, which you know when you think about a 15 percent drop as compared to 42 percent, that's like one third of the voters who previously had shown up not showing up and staying home.

And the reason is exactly what Governor O'Malley had said in that speech, because what's the point of selecting – showing up to the ballot box, engaging in the political process to select a candidate who's almost certain to fail.

JUDGE BREDAR: But did Republican registration go up during the same period? And if so, what do we make of that?

MR. KIMBERLY: There is a suggestion that Republican registration had gone up. I don't – truthfully, I don't know [18] what to make of that, except to

say that so far as participation in the political process is concerned, registering people doesn't matter much if they don't show up to the ballot box. And I think, ultimately, it's got to be participation in the election itself that is the measure of the engagement of the electorate. But – and here, incidentally, is a line graph demonstration of the drop off in actual voter turnout rather than percentages as actual numbers. You can see after 2010 there was a precipitous drop off.

But I'll say we don't just have the reduction in voter turnout at Republican primaries, we also have drop offs in fundraising by the Republican central committees in Allegheny [*sic*], Garrett and Washington Counties, we have focused on Allegheny [*sic*], Garrett, and Washington, because those were the counties that were in the district before the gerrymander and remained entirely in the district after the gerrymander. And what it shows is that during both midterm years and presidential years, fundraising has dropped off by six to 12 percent.

And that also is unsurprising, because when the Republican party, essentially, as Governor O'Malley put it, gets carved into irrelevance by a gerrymander you would expect to see lower financial support for that party.

And of course, beyond that, Judge Russell, as you [19] noted, it's simply the disruption of association that follows from sorting people on the basis of their part – excuse me, past electoral behavior, making it more

difficult for historical Republican supporters to associate with fellow historical Republican voters by cracking them into surrounding districts where their voices are effectively drowned out by Democratic majorities, that is what gerrymandering is all about. And we think the evidence here very clearly and strongly supports that conclusion.

JUDGE RUSSELL: But you want that as a matter of law. In other words, there's no evidence in the record demonstrating, for example, that the low turnout was weather related or is there a contrasting turnout by the Democratic party?

MR. KIMBERLY: And, Your Honor, the simple question [*sic*] to that is yes, there is no genuine dispute in the record on those questions. The State has not put those issues into dispute. The record is as it is before this Court. And I think you can conclude as a matter of law that these disruptions to the associational activities of Republicans in the area have indeed been disrupted. There's nothing to suggest otherwise. And so we submit that we're entitled to summary judgment on that question. Certainly, at the very least, we'd be entitled to a trial. There's absolutely no basis to suggest that the State would be entitled to summary [20] judgment on its cross motion.

Now, if I could, I'd like also to return to the question of vote dilution which I think is relevant.

JUDGE NIEMEYER: Let me just ask on that last point, which was said sort of casually. If you failed to make your case factually, and we conclude it

didn't establish the requirement, that ends it. You don't get a trial on that. You get a trial on a dispute that's been raised. And so this is a motion, basically, you're asserting based on affidavits, and your argument based on undisputed evidence, that there were these effects. And in order to create a dispute, the State would have to come forward with other possibilities and we'd have to resolve that dispute. But if it turns out that it's just inadequate as a factual matter, that ends the case. You don't get a trial on that; right?

MR. KIMBERLY: That's right, Your Honor, if the Court found that no rational fact finder could – and that's this Court in this case – could find in our favor on the basis of the evidence before it, then it would be a basis –

JUDGE NIEMEYER: I just wanted to keep the standard clear on this.

MR. KIMBERLY: Certainly. And I apologize if I misrepresented that standard.

Now, if I could, I'd like to come back to the question briefly of vote dilution. Recognizing again that [21] this is a entirely independent line of proven burden, and that if you're with us on this question of associational disruption you needn't reach this particular issue. Before I get to that let me just explain, vote dilution is proved with evidence of block voting and political cohesion. Those are concepts that are taken from the Section 2 civil rights litigation context where the question is whether minority performing districts have been

gerrymandered and diluted impermissibly in violation of Section 2 of the Voting Rights Act, those are quote, unquote, vote dilution claims. And I'll get in just a bit into the details of that framework.

And our position is that they have to – vote dilution so proved would have to make a practical difference. We get that from this Court's opinion on the motion to dismiss. And we think there are two ways of showing a practical difference; that's a chilling of political participation, which is related to what we were just talking about, and that it has demonstrably diminished political opportunity and influenced electoral outcomes. And I should say in saying that we don't need to prove that every electoral outcome has changed as a result of the gerrymander, I want to make sure we avoid that misconception.

And here's how the Court put it on the motion to dismiss, the injury is vote dilution. And to establish this element, the plaintiff must show that the challenged map [22] diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. It has to have made a practical difference. And so that's what I'm going to focus on here.

I should say this framework, I think, finds support in the majority opinion in *Gill against Whitford*. The majority opinion there confirmed that the harm of vote dilution arises from the political composition of a particular district, when the lines are drawn in such a way

that the vote, quote, "carries less weight than it would carry in another hypothetical district."

The majority in *Gill* describes this as a burden on plaintiffs' votes that has to be evaluated district by district. And, of course, we have a single district challenge here. So our position is that what the Court said, the majority in *Gill*, is entirely consistent with the approach that we have taken in this case to date.

So to show vote dilution there are typically three showings these are called the *Gingles* preconditions. And proof of these three preconditions is necessary, and we submit in this case, sufficient to show that the vote dilution has, quote, in the language of *Gingles* "impeded the ability of the targeted voters to elect representatives of their choice."

Now, I'll come back to that in a bit. The first element is that the minority group must be sufficiently large [23] and geographically compact to form the majority of a reasonably drawn district in the area. We know that element is satisfied, because between 1991 and 2011 historical Republican voters did form the majority of the district and had succeeded in electing their candidates of choice.

So my focus here is going to be on the second and third elements, what I mentioned before, the idea that the targeted minority's politically cohesive, and the majority into which and among whom they are dispersed, vote as a block, so that the dispersal of the targeted minority among the surrounding majority will generally defeat the political will of the minority.

And this is, in fact, the approach that our expert Dr. McDonald took to the question of vote dilution. He said he approached the question of vote dilution – this is on page 3 of his report – in a manner similar to that used in voter rights litigation. He evaluated the way that registered Republicans and registered Democrats behaved in elections and, unsurprisingly, came to the conclusion that most Democrats prefer Democratic candidates, most registered Republicans prefer Republican candidates.

This is evidence that Democrats vote as a block. If you are a historical Democratic voter you will generally vote as a block with other historical Democratic voters in your area. And if you are a registered Republican, you are [24] politically cohesive, you will generally vote together with other registered Republicans. And it is on this basis that Dr. McDonald found that the current 6th Congressional District has the effect of diluting the votes of Republicans.

This chart was a subject of our preliminary injunction hearing at some length. I'm presenting it here for a much more modest proposition than we discussed last time. It's just to say that when a district comprises a majority of Democratic voters, it's very likely to elect the Democratic candidate for office. This supports the inference that Democrats generally vote together as a block. The more Democrats you get in the district, the more likely it is that the Democratic [*sic*] gets elected. The more Republicans you have in the district, the more likely it is that the Republican gets elected.

And we have evidence of election day voting from members of the 6th District who were – who stayed in the district, who were taken out of the district, and who were added to the district. What this shows is that voters are not automatons, we're not suggesting they are. Voters exercise choice in every election. What this does suggest, though, is those areas that were removed had previously voted overwhelmingly, over 60 percent of the time – excuse me, over 60 percent of the electorate in favor of Republican candidates. And after they were removed in [*sic*] the district they [25] continued to do so. Likewise, those areas who were added voted overwhelmingly for Democrats, when they were added to the District they continued to do so.

JUDGE BREDAR: Don't we just have the same problem that we've had every time you and I have discussed this, which is the difference between what happened in 2012, and what happened in 2014, in the 6th. And, you know, your data, your line drawing in this context shows a nice cluster in terms of results and predictability and so forth, and how then do – what would statisticians say about a nearly 20 percent swing in terms of what happened in that district between those two elections?

MR. KIMBERLY: Well, I guess what I would say is that at this point –

JUDGE BREDAR: The Democrat won both times. One time by 21.5 percent and one time by 1.5 percent. Is that roughly correct?

MR. KIMBERLY: That sounds – yes, here's the graph, so it looks like a 18.5 percent swing.

JUDGE BREDAR: That's a pretty big swing in the context of what we're talking about here where it's all supposed to be so predictable based on how people align themselves.

MR. KIMBERLY: Now, I want to be very clear that at this point I'm not talking about predictability. I'm talking [26] about only the accepted legal concepts of block voting and political cohesion.

JUDGE BREDAR: Should we accept them in the face of data in our own case that show this kind of a swing?

MR. KIMBERLY: Well, I – simply put, I think the answer is yes. And it's because everything else indicates that voters who associate with the Democratic party typically vote as a block. And those who associate with a Republican party are politically cohesive, which is to say –

JUDGE NIEMEYER: I thought that's what Justice Kagan set out in her examples in *Gill*. She and Chief Justice Roberts suggested that the injury is not a change in the result, the injury is the disadvantage to the individual voter by diluting his vote. And the hypothetical that she used, I think, if I understood it, you don't even have to win to prove dilution. In other words, the Democrats would not even have to have won those elections if it were shown that the Republicans were targeted and their votes were diluted –

MR. KIMBERLY: Right.

JUDGE NIEMEYER: – disadvantaged in the process. In other words, they focused, they say it several times, they called it diminishment or disadvantaged to the voter in the voting opportunity. So I – I'm wondering whether it's productive to get too much into the predictability of results. You would expect a swing in the district, that's what the [27] Governor had said he wanted. And it, in fact, did happen. But the fact that we have one year where the margin was minor and two years where the margin was pretty comfortable –

MR. KIMBERLY: Right.

JUDGE NIEMEYER: – I'm not sure detracts from the theory that vote dilution is based on the disadvantage to the voter and has less of an opportunity.

MR. KIMBERLY: Your Honor, that's exactly right. And that's what I'm – that's ultimately what I'm driving at. I think Justice Kagan made another observation in her opinion that was helpful. She said only a perfect gerrymander would ensure beyond doubt that every electoral outcome has been changed. But the standard under the law is not perfection. It can't be that these sorts of targeting of individuals on the basis of the way that they have expressed themselves at the ballot box in prior elections. And in turn the clear diminishment of their political opportunity as a result is actionable only in the face of flawless perfection in execution.

JUDGE BREDAR: So you would have claims here that would succeed even if Roscoe Bartlett had won the 2012 election, despite the best efforts of the state authorities to try to redistrict him out of office. And if he had continued to win, through this decade, there's no requirement that it actually have the concrete result of flipping the district.

[28] MR. KIMBERLY: Well, I guess I would say that I think that's a more difficult question. I think you would be a lot less likely to see a lawsuit in that circumstance in any event. What I would tell you, for certain, our position is that if in 2014 a Republican had won, we'd still have a claim. You know, it's no answer to say, well, we were trying to rig all five elections, but we rigged only three.

Rigging an election by manipulating electoral – excuse me, districting lines is a clear – certainly a clear burden on the voting rights of the Republicans who are targeted. Their will is being thwarted by game playing with line drawing. And the standard cannot be that we have to show to a certainty that every electoral outcome has been changed as a result. That's why I led off by explaining that our goal here is to prove to you that there has been a practical difference that manifests, as Judge Niemeyer was saying, as a diminishment in the political opportunity of the Republicans in the old 6th District.

JUDGE NIEMEYER: I hope it wasn't me. I'm actually repeating the Supreme Court jurisprudence, which they repeatedly stated based on past,

they said it's the diminishment of the votes so that the person, in fact, injured in this instance has a vote of less worth.

MR. KIMBERLY: That's correct, Your Honor. And that's why I started with *Gingles*, which is what lays out this [29] framework and makes it very clear that that's what the standard is.

JUDGE NIEMEYER: Plaintiff has a right to an equally weighted vote, that's the type – that's what dilution is.

MR. KIMBERLY: Right. They're entitled not to be treated differently and in course to have a less weighted, less valuable vote, where the weight of that vote is manipulated by line drawing, because the map drawers in Annapolis disapprove of Republican voters electing Roscoe Bartlett to office. That's exactly right. That is the crux of vote dilution. And we submit to you in – excuse me, in Dr. McDonald's expert report, he undertook exactly this kind of analysis and found there was exactly this kind of result.

And, indeed, you know, he was – well, actually could we go back to the bar graph?

Ultimately, what I would say about election results, because I don't want to say that election results are irrelevant. But I would point the Court to *Johnson versus De Grandy*, a Supreme Court case from 1994, where the Court emphasized that vote dilution and election results are not one in [*sic*] the same, they are distinct, you can have one without the other, and the

other without the one. But lack of electoral success is evidence of meaningful actionable vote dilution. And lack of – equal electoral opportunity, that's the language that Judge Niemeyer was driving at.

[30] And what we have here is evidence of lost elections. So if you look at this graph that's up, you would have to conclude, and there would have to be evidence to suggest that this is really just a coincidence that has nothing to do with the line drawing that took place, so that those red bars up to 28.2 percent in 2010, those red bars to the left of the dotted line shifted to those blue bars to the right of the dotted line in a manner that had nothing to do with the redistricting.

We – I suppose what I would say is it is not our burden to show that each – that the swing from 28.2 to 28.9 is 100 percent attributable to the way that the lines were drawn. But this change in electoral outcomes is clear evidence of meaningful vote dilution. You don't – we have searched, we did a search of academic literature in other voting electoral outcomes, we couldn't find a single other instance in history where a vote swing had changed – this is nearly 50 points from 28.2 plus for Republicans to 20.9 minus for Republicans, nearly a 50-point swing that wasn't associated with an intervening gerrymander. This sort of thing just doesn't happen in the absence of this kind of manipulation.

And so what we submit to you is these changes in electoral outcomes are evidence of precisely the kind of vote dilution that the Supreme Court has said

represents a lack of [31] equal electoral opportunity that is an actionable burden within the meaning of the Court's redistricting cases.

JUDGE BREDAR: But drawing a line so that there will be some level of vote dilution is okay, because as Justice Alito has told us, partisan gerrymandering has been part of the process since the founding. So how do we know when there's been too much?

MR. KIMBERLY: Well, I would point the Court, I think in that regard, to the associational harms that we've identified. Because the two go hand in hand. And I think putting them together makes a rock solid case. We have clear vote dilution here. It is coupled with not only changed electoral outcomes, but as we explained the last time we were here, according to *The Cook Political Report*, the largest partisan swing anywhere in the country. And you couple that with all of the ways it has disrupted Republican political expression and participation and association in the area, and I think you have a very clear recipe for a First Amendment injury sufficient to warrant injunctive relief.

JUDGE BREDAR: But the Supreme Court has said there's a flat ban on punishing people by virtue of their political party membership. No lawful language like, well, there can be some of this, just not too much, which they have, you know, talked about in the context of voter dilution. I mean they're different. It's a much crisper analysis, isn't [32] it, in the context of

state action designed to interfere with political association than is it with respect to state action that's designed to draw the lines so that there's some political consequence, some partisan consequence in the actual votes that result, but not too much.

MR. KIMBERLY: Your Honor, I don't actually think that distinction really holds up, because the cases that we cited to this Court and to the Supreme Court in our merits briefing, make clear that even in more traditional First Amendment retaliation contexts like employment and handling of prisoners, it isn't enough to show hurt feelings, insults are not the stuff of a First Amendment retaliation claim. You have to show that the action taken has actually imposed a practical burden. That's where we got this standard. This is why we presented it to the Court in this way on the motion to dismiss.

And so, you know, for example, you could have somebody who attempts to impose – some superior in state government attempt to impose a burden but it fails, or says something that hurts the feelings of one of his employees because of the way that employee had behaved at a public rally supporting someone that that superior didn't also support. That's not the stuff of a First Amendment retaliation claim. So courts are constantly in the business of drawing the line between abstract injuries and hurt feelings on the one hand, [33] and actions that actually make for a concrete burden to support a First Amendment retaliation claim.

JUDGE BREDAR: But don't we know that some concrete burden, some relatively minimal, but some concrete injury sustained by voters is permittable – is permissible in terms of the consequences for an election? The line drawing to try to nudge a district to be a little bit more Democratic is okay, because it's been part of the – it's root and branch of a political process.

MR. KIMBERLY: Sure. And I guess my response to that is our position has never been that you have to take all consideration of political consequences [*sic*] redistricting out of the mix. Our view is that there are a range of other sorts of considerations that can go into the way that lines are drawn that might nudge political outcomes one way or another, that have nothing to do with a specific intent to burden voters because [*sic*] the way they have voted in the past.

So to give one example, the evidence in this case is that Congressman Ruppersberger wanted Fort Meade in his district because at the time he was on the Intelligence Committee, and he thought it would help him politically to have Fort Meade in his district. That is a political consideration designed to make it easier for him to succeed politically. It is not the same – and that –

JUDGE BREDAR: But not a partisan consideration.

[34] MR. KIMBERLY: No it is a partisan consideration, because to give it instead to the Republican candidate, the 1st District, which is probably

what it would have gone to based on where it is, would give the Republican an advantage politically, or at least deny the Democrat an advantage politically. So these are partisan considerations.

And Congressman Hoyer wanted College Park in his district because he's an alumnus and can raise money more easily from alumni of the University, if the University is in his district. He can bring, I guess, federal benefits to the University more easily if it's in his district. All with a goal of making it easier for him to compete in the political process. These are partisan considerations, designed to – intended to use redistricting to influence politics. There's nothing wrong with – you know, you might have your own judgments about whether or not that's tasteful or appropriate, but under our First Amendment theory it's not unlawful.

And so my response to you, in that line of questioning is that there is nothing inconsistent with what you have observed in applying our theory. It just means that the focus in the redistricting is on those other kinds of political considerations. What's off the table is a specific intent to single out people on the basis of the way they have voted in the past, and attempt to prevent them from participating meaningfully and on an equal playing field in [35] the political process as an expression effectively of disapproval of that past political participation.

Okay. So that's – and I'll be happy to come back to the question of burden. That's what we have on burden. I'd like to talk now a little bit about our third and

final element. And this, I think, is where last time we got – and I'll accept my own fault for this confusion – where we started talking about *Mt. Healthy* and whether *Mt. Healthy* burden shifting applied in this context. And I think there was a misunderstanding about whether it applied to demonstrating electoral outcomes were attributable to the gerrymander.

That is not what this element of the claim is about. This element of the claim is the question whether there are alternative explanations for the way that the lines were drawn, that suggest that even if the map drawers had not considered past partisan voting patterns and party affiliation, they would have drawn the district in such a way that the same results would obtain. Roughly the same lines, same sort of vote dilution, same sort of disruption of association.

And so *Hartman against Moore* puts it this way: Upon a prima facie showing of retaliatory harm, the burden shifts to the defendant to demonstrate that even without the impetus to retaliate he would have taken the action complained of.

[36] The idea is would the line – would the 6th District have been drawn –

JUDGE NIEMEYER: Is this question informed by the nature of the evidence supporting intent? In other words, if the intent is explicit, the intent here is not implied, the intent here is we want to switch the 6th District from Republican to Democrat. And to do so we're going to take out a bunch of Republicans and put in a bunch of be [*sic*] Democrats. It seems to

me if that's the intent to do that, then it's not a big step to go to the result, because that's exactly what they did. Whereas, if there were other reasons for that, then – and the intent was not explicit, then you get a much stronger case. But here the explicit intent was to do exactly what they accomplished.

And it seems to me that the first element feeds on to the last element and helps support the last element. Whereas, the first element they said, well, we just did it for political reasons or we wanted to redo the districts to improve the interests of the people and nothing else was said, then you'd have to go to the last element to see if there's any explanation other than First Amendment violations.

MR. KIMBERLY: I think that's –

JUDGE BREDAR: It's not my issue, but I've never understood why you need *Mt. Healthy*. It's not where I'm going, it's not something – I don't have a dog in the fight [37] because you know where I am on the broader issue.

MR. KIMBERLY: Sure.

JUDGE BREDAR: But as an abstract matter I've never understood why you need it on this proof.

MR. KIMBERLY: Oh, and I agree, Your Honor, I think it's the right way to think about the law. I don't think we need it. I think here the evidence is quite clear that the only reason they drew the map the way that they did is because they wanted to flip the 6th District.

JUDGE NIEMEYER: Because they said so.

MR. KIMBERLY: Because they said so.

JUDGE BREDAR: On TV, in this courtroom they said so.

MR. KIMBERLY: And because every other – and because every other explanation they gave is just flatly disproved in the evidence. The only one that was really pressed in the evidence is the I-270 corridor explanation. But, in fact, what the evidence shows is that no one actually – no one who was actually involved in the redistricting thought one second about the I-270 corridor.

Martin O'Malley was very clear that what they were considering in engaging in the redistricting was they wanted to do it in a timely way that was consistent with what the census results were. That makes sense. They wanted to comply with the case law concerning one person, one vote, and Section [38] 2 of the Voting Rights Act. That also makes sense. And then besides those two things, the only thing they cared about was flipping the 6th District.

I'm going to skip this. And, you know, here for instance, is Speaker of the House Busch confirming he didn't think –

(Video played.)

MR. KIMBERLY: Nobody was thinking about the I-270 corridor. I'm not going to guild [*sic*] the lily here. I think the point is pretty clear. Every witness

asked about the I-270 corridor, who was involved in the redistricting said, no, I didn't think about that. Including Eric Hawkins who explained he doesn't – not only didn't he do it, he didn't recall anybody else thinking about the I-270 corridor.

So the only context in which the I-270 corridor comes up are these GRAC public hearings, which the evidence shows, as we explained in our briefing, was really window dressing for the behind the scenes process. And the only people who raised the I-270 corridor explanation were all Democratic party insiders, who are saying roughly consistent things about a supposed community of interest and linking Frederick and Montgomery Counties. But when asked whether comments taken at the public hearings influenced the way the map was drawn, a GRAC chair Jeanne Hitchcock said, no, they didn't.

[39] And so that leaves, I think, the rest of the permanent injunction framework recognizing that that's at least what we're asking for from the Court at this point. I think the question of irreparable harm is straight forward. The case law that we cited to this court is straight forward. That elections held under unconstitutional maps –

JUDGE NIEMEYER: What's the remedy you're asking for?

MR. KIMBERLY: The remedy that we're asking for is an order enjoining the defendants from enforcing the map as drawn. What I would suggest –

JUDGE NIEMEYER: That doesn't go far enough, does it?

MR. KIMBERLY: Well, it would require in turn for the legislature to enact a new map consistent with the legal principles that the Court lays down, if it were to enter an injunction of the kind that we're asking for.

Now, if it turns out that the legislature is unable or unwilling to do so, either because there's not enough time or because Democrats and the legislature and Governor Hogan in the Governor's mansion can't agree on a map, I think then it would fall to this Court, as is typical in these kinds of redistricting cases, to adopt a map of its own. But we would suggest it's appropriate at least as an initial matter to give the legislature and [*sic*] opportunity to –

[40] JUDGE NIEMEYER: The legislature and the Governor could not even agree on giving it to a commission, could they?

MR. KIMBERLY: They couldn't. And, Your Honor, if this Court concluded that would be a waste of everyone's time, we would certainly be happy –

JUDGE NIEMEYER: I don't know if we can conclude that. But just as a practical matter, thinking out loud, it's – if you're thinking about a remedy and if you were to follow through on your particular claims, timing gets to be an issue.

MR. KIMBERLY: It does.

JUDGE BREDAR: But before the Court jumps into it and starts to draw lines or appoint its own expert or appoint its own commission to do that, it seems that it would only be fair and respectful, as much as we can be, of the role of the other branches, to allow them an opportunity to come into compliance on their own through their own means and methods.

MR. KIMBERLY: And so one alternative – I might suggest, the approach taken in Wisconsin was an injunction was entered against enforcement of the map. And then the question of remedy was briefed separately. I think that would be an appropriate course here, because remedy is not something we've briefed at length.

I would point the Court also to North Carolina, my recollection is that before the Supreme Court proceedings in [41] that case there was leeway to the legislature to attempt to draw a fair map, while in parallel the parties and court worked on their own map. And setting a deadline for what the legislature could accomplish, the Court was – would then in theory, if it hadn't been stayed, would then in theory have been at the ready with a neutrally drawn map of its own if that deadline passed without any objection by the legislature and Governor's office.

But these are all issues that we haven't yet briefed. And it might be that the appropriate course, if the Court were inclined to enter an injunction, would be to order expeditious briefing on that question after entering an injunction.

JUDGE NIEMEYER: All right. Why don't we give the State a little bit of a chance unless you have some –

JUDGE BREDAR: I have one more question for Mr. Kimberly, if I might, Judge Niemeyer. And that is tell me about where in this record do we find evidence of associational injuries and harms, and what are they specifically in your view? We've had some theoretical discussions about what they could be, what they have been found to be in other cases, but in the record of this case, assembled by you and your opponents in the discovery phase, what are we left with as proof of actual injuries in the context of First Amendment retaliation and in relation to [42] associational rights?

MR. KIMBERLY: So I would say it was what we had discussed earlier. It's the actual election returns, which were disclosed to us in discovery in part of the record. Those election returns show – or I should say – yeah, it's I guess it's properly described as election returns – show decreased voter turnout in Republican primaries. That –

JUDGE NIEMEYER: That's what Justice Kagan focused on, the effect on the party.

MR. KIMBERLY: Right.

JUDGE NIEMEYER: She talked about ravaging – that the injuries are ravaging the party he worked to support. In other words, people lost – didn't

support it as much and they didn't show up in elections as much. That would be the best evidence you have; isn't it?

MR. KIMBERLY: That I think also with the campaign finance disclosure reports, which show –

JUDGE NIEMEYER: Well, that's the support.

MR. KIMBERLY: Yes, the decreased financial support. Exactly. Yes. And I think also, as Judge Russell noted, you can also just look at the way that voters here were sorted. The fact of the matter is 60-some-odd thousand historical Republican voters were removed from the district and are now thwarted in their ability to associate with like-minded Republican supporters who were left in the district. I think [43] that too is just a very straight – I mean, you can't deny the disruption of association that's associated with that observation. Whereas, before they could get together and work to select a candidate that they wanted to send to Congress, they can no longer.

JUDGE BREDAR: Can we just take notice of that or do we need affidavits from individual Republicans who formerly were in the 6th, now they're in the 8th or the 3rd, who say I can't do this anymore, here's what I lost. I used to belong to a Republican club and the line split us right down the middle. Now I'm not in the same Republican club anymore. Now I'm over in the 8th.

MR. KIMBERLY: I think the more straight forward observation is simply that those who were moved from the 6th can't vote in the 6th District anymore. So they cannot, I suppose in sort of a, you know, if someone were inclined to campaign for candidates in districts where they didn't reside maybe it – I mean, I think it's commonsensical to think that Republicans in the 8th District would work to support the 8th District candidate, but to no avail because they've been drowned out and diluted by Democrats in the area. And Republicans in the 6th District will work to support members, candidates for congressional office in the 6th District, but again to no avail, because they've been drowned out by redistricting. Whereas, before the gerrymander those two [44] groups could have worked together to – with greater electoral success. And the reason they cannot now is because they've been singled out for disfavored treatment, they've been placed on an unequal playing field, and as a consequence have not enjoyed the same political opportunity that they had before.

JUDGE BREDAR: Are there some associational impacts that do not translate directly to voting. Suppose that one was persuaded that there was something very much awry here, but felt that proving it through actual election returns and voting patterns is problematic because of a history that has been set for us by the United States Supreme Court in the context of voting in particular. Aren't there other First Amendment rights and interests of an associational character that don't tie so directly to voting?

MR. KIMBERLY: Yes and –

JUDGE BREDAR: Advocacy.

MR. KIMBERLY: Sure. Financial support is one example. Which is something that we have. And, of course, we also have the deposition testimony of our plaintiffs explaining exactly this kind of disruption and confusion more broadly than just showing up to the ballot box. But I think, of course, showing up to the ballot box is highly relevant, certainly it's an exercise of First Amendment rights. And the ability of Republicans to associate in the area now has been disrupted. Thank you all.

[45] JUDGE NIEMEYER: All right. Who are we going to hear from, from the State, Ms. Rice?

MS. RICE: Yes, Your Honor.

JUDGE NIEMEYER: I'll tell you what, why don't we take a short recess. And you can gather all your thoughts, as have you have already been doing, right after the break. We'll take a short recess.

(A recess was taken.)

JUDGE NIEMEYER: All right. Be seated, please. Ms. Rice, you haven't been standing there the whole time, have you?

MS. RICE: I have not.

JUDGE NIEMEYER: All right. We'll hear from you.

MS. RICE: Good morning and thank you. The plaintiffs are seeking an injunction applicable only to the –

JUDGE BREDAR: Let's talk about settlement first.

MS. RICE: Yes.

JUDGE BREDAR: Where does the State stand with respect to the viability of a settlement negotiation?

MS. RICE: Your Honor, as an Assistant Attorney General, I don't know that I can currently make any representations about the viability of a settlement negotiation more to say that the State is always willing to dialogue with any party seeking to settle a case. We have not [46] yet been approached in this matter. The client, State Board of Elections is not independently empowered to draw congressional district lines. The reason they're the defendant in this case is because they're charged with implementing that electoral map and that would be the proper subject of the injunction, but there are clearly other –

JUDGE NIEMEYER: Let me suggest something, because I'm fully sensitive to your role and its – I mean, you're a spokesperson for a very complex process and agencies and so forth, is there any room in your role to have the administration – and actually it would have to be, I suppose, the Attorney General and

the Governor – but approve some notion where you could yield to a court jurisdiction over this issue, and agree to some kind of commission, say, headed up by a magistrate judge. And then having a designee of you and a designee of the plaintiffs on there and see if they can't work something out –

MS. RICE: Just to be clear –

JUDGE NIEMEYER: – to try to obviate the problems you were talking about, which are real, there's no doubt about it.

MS. RICE: Sure. Just to be clear, the Attorney General's role here is just to defend the constitutionality of the law, he does not take any position in this matter or would likely not be involved in any resolution of the matter. But [47] in terms of are there options, could we think creatively about a way forward if there was interest on both sides to create a dialogue, I'm sure –

JUDGE BREDAR: I don't hear any state officials within your specific client, or more broadly among the State in general, which the Attorney General represents, overtly defending and advocating for the appropriateness of extreme partisan political gerrymanders. I don't see that in this record, certainly, and I don't see it more broadly out there in the wider world.

If anything, the conventional wisdom seems to be that it's a bad thing, that there's much agreement with what the Supreme Court has said in other cases, that

it's repugnant, that it's in conflict with basic principles about how Democratic government ought to operate and ought to work. Even forces in the state of Maryland have gotten behind legislation saying essentially, Maryland would go along with some kind of a more neutral approach, if other states would as well. That's certainly something that we're all aware of.

So, accordingly, is there an opportunity here, a moment when it's appropriate for litigants in the Maryland case to reach out to litigants in another case, say Wisconsin or North Carolina, where the political equities are exactly opposite of what they are in Maryland, and settle two cases simultaneously with a net effect that no one gains political [48] advantage, which seems to be what's ultimately driving all this.

Everyone condemns it. Everyone says it's terrible, but nobody will fix it, because nobody's prepared to unilaterally disarm. Well, then find others who you can get in partnership with and settle the Maryland and Wisconsin cases simultaneously, with no net effect in terms of the politics, other than the people have a more pure Democratic process. Is anyone thinking along those lines?

MS. RICE: Your Honor, I will certainly bring back the thoughts from this morning's hearings to my clients. I have not, before this hearing, had the opportunity to discuss settlement with them. We have not been approached by the plaintiffs in the past about any willingness to settle. So I just don't have the information –

JUDGE BREDAR: The state of Maryland settles difficult cases in this court every year and perhaps every month. And some of them require all kinds of steps that have to be taken back with the Board of Public Works, even back to the legislature. You know that from personal experience, that our magistrate judges resolve those matters on a tentative basis subject to appropriate legislation being adopted, or the BPW ratifying. But there are ways by which your very complex client can be brought to the settlement table successfully and agreements can be reached that resolve hard thorny problems [49] like this, if there's a will.

MS. RICE: Your Honor, I do agree that there are many different methods and that our office would always advise our clients on the availability of different methods and work creatively with the Court and the other parties to settle a case. I just don't have any information about the willingness to do so at this time. I would point out that Wisconsin is a state legislative case and in North Carolina the gap is something like it's – the number of seats at issue is many more than the one at issue in this case.

JUDGE BREDAR: You could sweep away all of these problems by states such as Maryland and Wisconsin agreeing that across the board, nonpartisan commissions would do the districting at the state legislative level, at the level of congressional districts, and clear away all of these issues in both states with one sweeping initiative that is just adopted on a mere basis

in both places, to no net – no significant net political effect.

MS. RICE: Your Honor, we definitely appreciate these comments and the creative direction that they're heading.

JUDGE NIEMEYER: All right. You have a motion for summary judgment against you, which you've answered, and then you have filed a cross motion for summary judgment. So however you wish to handle it, we'll hear from you on that.

[50] MS. RICE: Thank you, Your Honor. I think that we'll start with our cross motion for summary judgment. And I think it is, again, appropriate to go back to what the plaintiffs have asked for, the context in which they're asking it. We – the plaintiffs are looking to enjoin just the 2020 election. That's one – the 5th and last election under the 2011 plan. The 2011 plan was arrived at only after public comments, compromise between the Governor and the legislature, of all of the incumbents, Republican and Democrat, and approval by the voters of Maryland in referendum.

There have also been many changes of circumstance since 2010. We're actually gearing up right now for the conduct of the 2020 census. So there are many demographic changes that have happened since 2010. There is a different match up in the 6th Congressional District. Congressman Delaney has announced his retirement. We have two new candidates that are facing off in the 2018 election, and we have no evidence of the plaintiff's [*sic*] preferences in that race.

All of this is happening after we have had a long and whirry [*sic*] procedural history of this case in front of this court the plaintiffs did not bring –

JUDGE NIEMEYER: Not many cases have a Supreme Court chiming in twice.

MS. RICE: It's true. We're lucky –

JUDGE NIEMEYER: And still having to take it [51] again.

MS. RICE: We're lucky in that way to have had their wisdom multiple times. And because of that we did not even get this claim from these plaintiffs until March 2016, after the 2016 primaries had already concluded. And the third election cycle under the plan was well underway. So those things have not changed since we were here on the preliminary injunction motion.

Subsequently, the plaintiffs were afforded five months of fact discovery, an additional month of expert discovery, and this Court offered to entertain motions to reopen discovery on remand. An offer which neither party has taken them up on. So that is how we got here. And we are here on motions for summary judgment. The plaintiffs have the burden of persuasion in their claim. So under *Ricci* and *Celotex* you can find in favor of the state in our cross motion for summary judgment merely by finding that the plaintiffs have not met the burden of production on one or more of the elements of their claim.

And we agree with the plaintiffs that there are – do not appear to be many disputes over the material facts as to burden and causation. But what the plaintiffs have done is asked you to make inferences with respect to causation that are not supported by evidence. They can't now hope that evidence will be developed at trial, they must make those [52] demonstrations on the record that are –

JUDGE NIEMEYER: I think I – I think I gather you agree with what I tried to clarify with Mr. Kimberly, which is if they failed to advance facts sufficient to carry their case, then they're not entitled to summary judgment. And the only way to go to trial on that is if they have carried it and then you've created a dispute about those facts. And that needs to be resolved to resolve the case. And it looks to me like both parties have spent a lot of time putting forward almost every fact they have. And I can't foresee anymore facts coming forward.

But you're not entitled to that under summary judgment, you don't get a second crack. If you haven't put your facts forward, sufficiently to carry the day, you lose. And that – I think that's standard Rule 56 jurisprudence; isn't it?

MS. RICE: That's correct, Your Honor. And we also need to bear in mind here that the plaintiffs are seeking a permanent injunction. The four factors are the same, more or less, than a preliminary. The only difference is that plaintiffs actually must succeed on the merits of their claim, not just show likelihood of

success. This is a high bar, as it should be. Even if success on the merits were certain, it's not enough. They must still satisfy those equitable factors. And there has been no change since the Supreme Court [53] held in Benisek, that the plaintiffs failed to do so. They've put no further facts forward on their irreparable harm. In fact they haven't updated the facts that they had about the effects of future elections in their supplemental motions.

So I think –

JUDGE NIEMEYER: Well, I don't quite understand irreparable harm. I understand some of the other equities you've mentioned in your papers, but irreparable harm would be if there has been dilution or injury to their associational rights, those are things – those are still in place, the lines are still in place which have given rise to that. And this is not a damage case in terms of dollars. This is to rectify, according to them, a First Amendment violation. And so on that issue, I have a very hard time conceptualizing what you're saying, that equity would seem to be the only court that could address the remedy. But your other points I understand them from your papers.

MS. RICE: Sure. I think that maybe looking back at this Court's legal finding three, and the memorandum on the preliminary injunction would be helpful. There this Court quoted *Bryant v. Cheney* for the proposition that standing for irreparable injury is ongoing. And that when plaintiffs are seeking prospective – sorry, that's paraphrasing, are asked – the Court is

asked to award prospective equitable relief for a concrete past harm, and a plaintiff's past injury [54] does not confer standing upon him to enjoin the possibility of future injuries.

And I think there we are again, thrown into this complex world of voting causation and what the electoral circumstances actually are on the ground in the 6th District in 2018 and 2020. We just don't have anymore information. We don't even have information from the plaintiffs about what their electoral preferences are, whether it would be for David Trone, Amie Hoeber, or some third candidate, or perhaps even to write in Roscoe Bartlett again. The record's just devoid of that information.

And we did, by contrast, have information that each of the plaintiffs, like good voters do, examines each of the candidates for all of their flaws and strengths, and makes a decision based on the candidates. And each of their depositions each plaintiff admitted at one time or another to voting for a Democrat. Some of these were for not congressperson, a more local matter, sometimes even a judge, but each could recall a time that they had crossed party lines and voted for the other party. Out of the plaintiffs that lived in the 6th District and were eligible to vote at a time – at the time, all four of those plaintiffs Benisek, Strine, Cueman, and Eyler, admitted to voting for a Democrat for Congress, someone other than Roscoe Bartlett, going back that far.

[55] So here we have the plaintiffs, as most voters do, making representations that they evaluate the races individually. And we don't have any information from them about how they would evaluate this match up. It might be a reasonable inference to draw that they would still disfavor John Delaney in subsequent elections, but now that he is not seeking that seat, we simply must proceed without – I think it is helpful to look at *Gill's* pronouncements about standing. *Gill* emphasized that standing was an individualized as opposed to a party-wide injury.

And I think that that is very important here. The majority did not embrace Justice Kagan's suggestion of associational injury even to establish standing. Although, it might be tempting to do so to sort of extend that rationale. And –

JUDGE BREDAR: They didn't reject it either.

MS. RICE: They didn't object to it either. And an interesting fact is that the Supreme Court remanded both *Gill* and *Rucho* for further proceedings on standing, even though the Courts in those matters had made specific findings about district-wide electoral results. So I think we can take from that that there's something more that needs to be done, that something extra needs to be done to tie in individual – the burden on an individual vote, than merely repeating the district wide –

[56] JUDGE NIEMEYER: I thought the Court, if I understood the Court's holding, it was pretty

narrow, and the holding basically was that the plaintiffs did not seek – I'm now quoting – to show such requisite harm, since on the record it appears that not a single plaintiff sought to prove that he or she lives in a cracked or packed district. And – end quote. And the Court pointed out that it's an individual claim and that a person who seeks to assert a right for dilution, or I suppose associational rights too, would have to live in the district that was affected. And it seems just the opposite of what you're saying, that if they do live in the district they have standing.

MS. RICE: Sure. So we can look at the Supreme Court, I think it's at page 1933 in the Supreme Court Reporter, has a discussion of two of the plaintiffs in *Whitford v. Gill*, and one is Whitford who admitted his vote was neither cracked nor packed on the stand. And then there's another plaintiff Donohue. And the Court says Donohue on the other hand alleges that Act 43 burdened her individual vote. And that was because she claimed residency in one of the districts where Democrats like her have allegedly been deliberately cracked.

But the Supreme Court didn't find that allegation sufficient to find that Donohue had standing to proceed with the claim. If it had, there wouldn't have been the standing [57] problem. So we're, again, looking at something more, something that actually shows, like this voter had some impact to their own vote. So I think –

JUDGE NIEMEYER: The Court didn't say that, the Court says to the extent the plaintiffs allege harm is the dilution of their votes, that injury is district specific. This disadvantage to the voter as an individual, therefore, results from the boundaries of the particular district in which he resides. And the plaintiff's remedy must be limited to the inadequacy of [*sic*] that produced his injury in fact, that is the disadvantage. In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own districts.

And then the Court went on to point out that in this case they were challenging statewide injury and taking the plaintiff as to where they were. The plaintiffs argue that their claim of statewide injury is analogous to claims presented in *Baker* and the Court then said that's not true. And that's the only standing it addressed.

But it seemed to me, it's pretty clear, and you look at Justice Kagan's opinion too, it's pretty clear that if you live in the district which you are challenging, because it was cracked or packed, you have standing to challenge that. Now, whether you win or lose is another injury, but the standing is created by the disadvantage of their vote in that district.

[58] MS. RICE: Your Honor, I don't think we're disagreeing –

JUDGE NIEMEYER: Okay. Fair enough.

MS. RICE: – disadvantage that exists would be –

JUDGE NIEMEYER: I thought you were suggesting that a couple of people in the *Gill* case actually had standing.

MS. RICE: No, I think what I'm saying is that something more has to be demonstrated about what that cracking or packing is –

JUDGE BREDAR: Well, so when the North Carolina case was remanded, and the Court said very briefly what they said vis-a-vis North Carolina, and that case went back, and the panel reconsidered, and then issued their new opinion and found that there was standing, what – what more did they actually really find on the road to concluding that there was standing in compliance with what *Gill* said there had to be? Not much.

MS. RICE: Well, actually quite a lot. And you anticipated where I was going. And August 27th the *Rucho* court came out with a new opinion. And there the standing facts were well-developed. Each individual put on evidence that their precinct would have been better off, in terms of the way that their precinct voted, would be more like the district total, under 2,000 different maps that were computer generated. So in more than half of those computer generated [59] maps, they would have been better off. So they made actually quite a strong showing that their individual right to vote had been burdened. Because they showed that in the possibility of alternative districts they had

been put in one of the districts that would have most burdened their votes.

So we don't have any of that evidence here. We don't have any expert that's come before you to give you that kind of evidence. We have a singular map that was – could not even be said to have been drawn without reference to political data. And if you look at it – let me put it up here. Is that showing up for you? This is the single alternative map.

And Dr. McDonald admitted that he himself did not draw this map, he had his graduate student do it. When questioned at deposition he could not guarantee that the graduate student had not resorted to political data when drawing that line. The graduate student had access to the data and Dr. McDonald did not have a conversation with him about whether or not he looked at political data.

You can see that the choice was made here to include both Gaithersburg and Rockville in the alternative 8th District that was proposed. And if you look at this is just the next page in that report, the consequence of that choice is that the 8th District becomes even more packed with Democrats than it had been under the prior map.

[60] So – and Dr. McDonald himself admitted that this alternative map – again, this is to establish standing we're not talking about remedy, we're talking about standing, that this alternative map would also burden the votes of Democrats in the 8th District. And the reason that's important here at standing – in standing is

because that makes it not a neutral comparitor map. This map has serious political consequences. It resulted in –

JUDGE NIEMEYER: Sounds to me you're arguing the merits of the case. Standing just focuses on whether he can be in court and make a claim. And in this case the plaintiffs are in the very district and voted in the very district that was affected, and they make a claim. Now, whether their claim is good or not, we have to test that. But I think on the threshold of standing, then no one would have standing in these cases if it weren't the voters affected in that district. At least they claim to be affected. They voted in that district. And they voted in a district that was redrawn to dilute their vote, allegedly.

But I don't know – I don't quite understand why this doesn't fit exactly with what Justice Roberts and Justice Kagan were pointing out pretty straight forwardly.

MS. RICE: Well, Justice Kagan went on a little bit more at length than Justice Roberts did in explaining how you might demonstrate standing. One of the things she said, and [61] plaintiffs also pointed this out, you have to demonstrate by way of a neutrally drawn map that such a citizen's vote would carry less weight, have less consequence –

JUDGE NIEMEYER: That's to show dilution. And then she went on to talk about associational. But that would – to have standing, to bring a partisan

claim on vote dilution, the plaintiff must prove the value of her own vote has been contracted.

MS. RICE: Correct. So to show that your own vote had been contracted you can't just refer to what actually happened, because you don't – you can't see – and this is part of what we talked about last time, also on the merits – you can't see very well or understand statistically whether that is an effect of the redistricting, it is an effect of where you live and changing demographics. To demonstrate that you need something more. And we're at summary judgment, we're not at pleading stage, and evidence is necessary to demonstrate injury at this stage.

So for the vote dilution injury and we can talk about in a minute the associational harms and the evidence there, but for the vote dilution injury, this map that does not explain whether or how many voting tabulation districts or census places are split in the line, that wasn't part of Dr. McDonald's report, that has no explanation of the effects on the neighboring districts, and in this case it's just the [62] 8th –

JUDGE NIEMEYER: What about the evidence that's been advanced that you only needed to remove 10,000 people from the 6th District to comply with the census. Instead, 66,000 Republicans were removed and 20-some thousand Democrats were reintroduced into the district, with the results that the Republicans still continued to vote and the Democrats still continued to vote as they did in prior deals, but their vote didn't have as much value. And that

evidence is in the record, whether it carries the day is something we have to make a judgment on, but it seems to me, for standing purposes, they have alleged that there [*sic*] – the value of their vote has been contracted.

MS. RICE: That evidence, I think we've discussed at length in the past and the – there's a fallacy in saying that only 10,000 people needed to be removed. Because we're talking about redistricting an entire state. We didn't – Maryland didn't redistrict the 6th District in isolation. There were severe population deficits in other parts of the state that needed to be remedied somehow. And in doing that, making those choices, some of which very clearly, including taking the 4th district out of Montgomery County, had absolutely nothing to do with big P partisan politics, *Fletcher v. Lamone* talks about at length about the legislature's intent and adopting the proposal of the Black [63] Legislative Caucus in that move that –

JUDGE NIEMEYER: I don't understand, I thought the 6th District only needed to be reduced in population by some 10,000 people. And those 10,000 people could either be moved into the 3rd or the 8th Districts. And the question is why such a big change when that's a very modest change. I'm sure there are other districts that might be affected by the census, but that – you would expect that if they told the mapmakers we want to get rid of a Republican candidate and have a Democrat win there, that was the goal that the Governor said he had and that's what the map drawer was told that, give us a 7 to 1 map.

MS. RICE: If we're looking at what needed to be done to accomplish the legislature's goals, there's no indication that the legislature and the Governor would have changed their mind about the Chesapeake Bay crossing if it had not helped them –

JUDGE NIEMEYER: I was focusing on just the 10,000 which is a very modest –

MS. RICE: Sure. But I guess what I would counter with is that you cannot focus just on the 10,000. To do so would be to make very grave error about the way that these things are done. The 1st, the 2nd and the 7th all had massive population deficits that needed to be made up. They were bordering the 6th at the time.

[64] So when you look at the shed portions, and this is a page from Dr. McDonald's expert report, he's the one that did this analysis, you can see that the 7th District – for example, the 6th District gave 17,203 people to the 7th District. That's because the 7th District had a massive population deficit. And the 1st District over 100,000 voters needed to be made up for when the Chesapeake Bay crossing was eliminated.

The 6th District had, in the prior map, extended all the way to the Susquehanna River. It went across the entire northern border of the state to border the 1st District. So the legislature, I think, pretty reasonably moved that border westward, back towards the core historic shape of the 6th District. So to say that these population moves were not occasioned by other goals of the legislature is to –

JUDGE NIEMEYER: Let me ask you –

MS. RICE: – reality.

JUDGE NIEMEYER: – what evidence do we have that they had other goals? In other words, we have the direct evidence of the people who made the maps and directed the making the maps. And what you're describing isn't what they said.

MS. RICE: It was, Your Honor. So Governor O'Malley talks about the respecting the natural boundaries of the Chesapeake Bay in his deposition –

[65] JUDGE NIEMEYER: Well, that was when he made the decision to not go across the bay. He said he had to make a choice in order to get a 7-1 state, he had to make a choice either to focus on the Eastern Shore or to focus on western Maryland. And he said the problem with folks on the Eastern Shore were jumping across the Chesapeake Bay, but he didn't back off from the notion that he wanted a 7-1 state and that's what they directed the mapmaker to do.

MS. RICE: I think that if you read that colloquy in context, what he says, that all other things being equal, meaning all other goals of the legislature being met, which include these goals about the 4th District, which was very important to the legislature and proved to be a contentious issue that was litigated before this Court before this case was brought, that those were other goals.

And so the fact that that goal of moving eliminating the Chesapeake Bay crossing, which is a very wide

overwater crossing, also allowed the Democrats to create a competitive district where for the first time they would see a fighting chance in that district to elect a candidate of their choice, after they had heard extensive testimony at the GRAC that that was a concern, including testimony from a former plaintiff in this case, who said that it was eminently reasonable to return the 6th District to its former shape, which would have included the western third of Montgomery County. Again, [66] that's consistent with this I-270 corridor. That's about where I-270 splits the county. That evidence was before the GRAC, that evidence was on the mind of the mapmaker. We have evidence affidavits from the –

JUDGE NIEMEYER: Were there GRAC hearings after the map had been drawn?

MS. RICE: No, the GRAC hearings were before the map had been drawn and the documentation –

JUDGE NIEMEYER: There was no map – there was no proposed map in consideration when they had those hearings?

MS. RICE: Correct. But the time line is that the GRAC hearings were held. The map was drawn and completed at the same time the Governor was gathering input from the congressional delegation, including in-person meetings with both Congressman Bartlett and Congressman Harris, to get their input about what they would like to see from their districts. And the GRAC map was proposed. That's where that

slide show comes in, that again mentions the I-270 corridor as a major organizing point of the geography of the 6th District.

The map was then put up on the public website. Additional public comments were held from e-mail comments. And then the Governor, with minor changes that we've stipulated do not bear on this cause of action, adopted his recommended map, sent it to the legislature. Again, there were a few changes, mostly metes and bounds descriptions type [67] changes. It was passed. Then the entire map was voted on by the people of Maryland.

So there isn't evidence, unlike in North Carolina, where the map had already been drafted and it was only after, you know, there's some evidence that that time line was not adhered to. Here there's no evidence of that. There's no evidence that a map had been drafted before the GRAC hearings.

JUDGE NIEMEYER: There is evidence, though, that the GRAC hearings were superficial, just to accommodate the public, and that the real map was going to be drawn by certain legislatures [*sic*] with the map drawer and the governor, according to the governor's wishes.

MS. RICE: So there's also really no evidence of that. And the plaintiffs put before you testimony from Eric Hawkins on intent. And this is kind of getting a little bit far astray, but since we're talking about it. We introduced affidavit testimony from Jake Weissmann, who was a staffer to the GRAC, about just how

seriously they took the congressional map. Both Jake and also Governor O'Malley stated that they had to scrap the congressional delegation's version of the map.

And I'm going to put it here so you can kind of see that this is the map that Mr. Weissmann testified was the proposal from the congressional delegation. Although, as [68] governor O'Malley would be quick to point out, it was not a unanimous proposal. So you can see how the 6th District here –

JUDGE RUSSELL: Why don't you use a pen or something and use the ELMO as a visual, if you could. Are you following me?

MS. RICE: I am following you. Let's see if I can do it.

JUDGE RUSSELL: Oh, no, just write on the ELMO.

MS. RICE: Oh, write on the ELMO.

JUDGE RUSSELL: Use your pen and point it out as you're describing it.

MS. RICE: I got it. So you can see this is the 6th District, the proposed 6th District, congressional delegation, it's green. And this is the proposed 8th, the pink one. The I-270 corridor is not intact.

JUDGE BREDAR: Laughable.

JUDGE NIEMEYER: That's a fairly complex map; isn't it?

MS. RICE: It is. And as you can see it is not the map that was adopted. And if we want to we can look –

JUDGE BREDAR: Highly reflective of what the politicians intentions were.

MS. RICE: Yes.

JUDGE BREDAR: Absurd on its face.

[69] MS. RICE: So here you can see that the map that was ultimately adopted, actually hews to the I-270 corridor, incorporating both Frederick and all of the Montgomery County portions that would be on the Montgomery corridor down to Rockville, which is too populous to include in a district with Frederick. So that's pretty good evidence that the I-270 justification was important, it was something that actually mattered to the mapmakers, because they altered that map that Mr. Hawkins was testifying about so profoundly in terms of what areas it picks up.

So I think that this just goes to demonstrate that there is a causation element that is missing here. We do not have specific testimony about specific borders about where the plaintiffs live in relation to those borders, why those borders were placed the way that they were. And what effect that had on the plaintiffs in terms of whether or not they would have been burdened under any alternative map or if it was just this one that did it. And I think that's why this is relevant in the standing context. Although, it of course also goes to the burden on the merits.

I think it's worth too exploring a little bit about whether they've met their showing for an associational harm on even at a standing level. First, if we look at *Gill*, and I think that Your Honors each pointed this out, that the associational harm that Justice Kagan is talking about is [70] really one that would enure [*sic*] most to parties or political organizations. There's not a lot of evidence here about the effect on the Republican party.

We have kind of unsupported cherry picking from campaign finance reports, that show at most a $4,000 decline in raising funds from one period to the next. But no explanation if that's unusual. No comparison to the statewide performance, none of the things that would allow this court to make a causal inference that that kind of decline in fundraising had anything to do with the redistricting or this map.

JUDGE BREDAR: Well, are we talking standing or merits right now?

MS. RICE: I think that these deficits are so profound that they do go to standing. We also need to think about the fact that standing is not dispensed in gross and that this associational harm is fairly new to the case in the way that the plaintiffs articulate it. They've talked about chilling, certainly, as another way to demonstrate their burden under the retaliation cause of action, but that's different than an associational harm, which would be actual damage to their associational rights.

So to the extent that the Court believes that associational harm could yield standing, I think we can kind of kill two birds with one stone there.

[71] JUDGE BREDAR: Well, a lot of the answer is rooted in the word "association," right? I mean, if you can't associate, you have an associational harm. And if you're divided from those with whom you previously meaningfully associated, isn't that the end of it?

MS. RICE: I think there too we need to think about what that means in terms of justiciability. If we look just at this map versus the immediately prior map, there's a lot of people in a lot of districts that are not going to be able to associate with the same people that they associated with.

JUDGE BREDAR: Well, that's true, for certain, every time there has been redistricting and there have been population changes in the a state. Without a doubt there are associational consequences from redistricting. But that's not the point. The point is what was the motivation in dividing these people from each other in this particular instance.

MS. RICE: But I think that's why –

JUDGE BREDAR: If the motivation was, look those Republicans concentrated together like that as they are, are able to fund raise and advocate together, strength in numbers in terms of the broader political process, not even talking yet about voting, we're going to break that up. We're going to do this to them because of the – their identifying as Republicans.

MS. RICE: So I think that that's why it's important [72] to think about this in a standing context, that we have to show that that injury is not a statewide injury or a injury that enures [*sic*] generally to anybody because of redistricting. *Gill* reiterated that much at least, that we have to show something more. So when plaintiffs got up here and you asked them what evidence is there of associational harm, one of the things that they said was just the splitting of the districts. That needs to be rejected as a matter of law, because the splitting of the districts breaks up these associations throughout the State in every redistricting cycle, as you just explained.

So then we're left with the supplemental briefing information, and we do have from them the assertion that primary turnout is somehow, in gubernatorial election years, is somehow the thing that we should be looking at. But if we look at some of the other data, and this was actually in our origin until [*sic*] summary judgment motion produced, you can see that turnout actually increased in most of these counties. In Frederick there's a percentage decrease, but the number went up. This is general elections, not primaries.

And here, let me just – my pen disappeared. The – this is the Republican turnout difference. So here in Frederick the percentage did go down, but the number of Republicans went up, who voted. Garrett went up, and Washington it went up. We also have evidence that Republican [73] registration went up year over year in all of these counties.

So at most we have mixed evidence on any effects of associational harm. And that doesn't necessarily – it doesn't generate a dispute of material fact, what it does is call into question the causal link that plaintiffs are asking you guys to draw, that there is some causal inference that would be permissible to be made from those 20 – those primary year – gubernatorial year primary turnout results.

So this defeats the blind assertion that there's some clear causal inference. And what's missing, what the plaintiffs failed to meet the burden to produce, is any expert testimony about turnout, what it meant, if this was a particular effect seen just among Republicans in the 6th District. If it reflected broader trends. That's not our burden to disprove. The plaintiffs needed to come forward with evidence to show that their associational – their claimed associational harm was in some way connected or caused by the redistricting.

Because it's only through that causal link that you guys – that Your Honors all rec – or two of this Court, set forth in the decision on the preliminary injunction, that causal link is still very important in this claim. That otherwise we're getting into the realm of not justiciable claims where we have burdens that are felt by the entire state, or burdens that are being felt by members of both [74] parties. So if we don't have the tools, the statistical tools, the expert evidence to distinguish those burdens, then the plaintiffs haven't met their burden of production on those elements.

JUDGE BREDAR: It's not enough that they're simply – that Republicans are divided from each other by a line that was drawn solely for partisan political purposes?

MS. RICE: It's not enough because that's not –

JUDGE BREDAR: That has to somehow manifest itself in some more detailed consequence than the obvious, which is they cannot associate with each other anymore in the way that is meaningful because they're no longer in the same district.

MS. RICE: So it's not enough because of the standing element as articulated by *Gill*, that there has to be some differentiation between plaintiffs and non-plaintiffs. It cannot be enough to establish standing that you've established a burden that occurs in every election to every person that is moved. It has to be something more. I think that –

JUDGE NIEMEYER: I don't fully understand, because if – and I can put it in very course [*sic*] terms that may not be fully satisfied here, but if the government says we are going to target you, Republicans, in this city, and make sure that you don't work together and that your vote doesn't have the full amount, and then they divide them in half, after that [75] statement, don't we have standing to challenge that by the people who are in those – in that city?

JUDGE BREDAR: The Republican people, can I modify it to that extent? The Republican people who are in that city.

MS. RICE: That – I think that the Republican people in that city would have evidence –

JUDGE NIEMEYER: Not evidence, do they have standing to challenge the conduct?

MS. RICE: They would be able to prove their standing through evidence that that conduct had in fact –

JUDGE NIEMEYER: – the evidence was that the government said we are going to target the Republicans in this city and cut them in half and divide them so as to dilute their vote and to ruin their party. And then they go ahead and they divide the Republicans. Do the Republicans in that city who have been divided and whose vote was diluted have a right to challenge it in a court?

MS. RICE: They might have a right under a First Amendment claim that hasn't been brought here. What the plaintiffs have claimed –

JUDGE NIEMEYER: I'm not talking about here, let's just get some foundational principles. And you're so reluctant to acknowledge that to me, a straight forward standing case, I tried to make it as clear as I could, and if [76] you reject that I'm not sure what your argument is.

MS. RICE: Judge Niemeyer, I think it's important, though, to remember that standing is not dispensed in gross, it's dispensed according to the requisites –

JUDGE NIEMEYER: It depends whether the person hurt, as distinguished from the person not hurt, the person hurt can sue the person who caused the hurt. And in this case, the harm the Supreme Court talked about is the disadvantage in the voting opportunity, the diminishment of the voting opportunity. That's the harm. Now, if somebody says I'm one of those persons, the Court should say, okay, let me hear your claim. And we'll look at the evidence then.

JUDGE BREDAR: None of the proof in this case is along the lines of we're going to attack voters, we're going to attack Republicans.

MS. RICE: Your Honor, I wouldn't submit that any of this proof in this case says anything about attacking anyone.

JUDGE BREDAR: We're going to attack the 6th, that's a direct quote from our former governor.

MS. RICE: The proof in this case shows that the general assembly and the governor intended to create a competitive 6th District.

JUDGE NIEMEYER: Is that a nice way of saying we want to take it away from the Republicans by moving the [77] Republicans out and putting in Democrats. In other words, we want a 7-1 state.

JUDGE BREDAR: And if not that, at least we are going to punish Republicans, regardless of vote – how they vote –

JUDGE NIEMEYER: – organize –

JUDGE BREDAR: We're going to interfere with their capacity to associate with each other to achieve their political aims.

MS. RICE: Again, this problem now is steering us away the solution that this Court had arrived at to find a claim justiciable and into the realm of nonjusticiable claims.

JUDGE NIEMEYER: – I thought we were talking about –

JUDGE RUSSELL: We're steering in the right direction. We just need an answer to the question.

JUDGE NIEMEYER: I thought we were talking about standing; right?

MS. RICE: Right. Yes.

JUDGE NIEMEYER: Okay.

JUDGE BREDAR: I'm not going to deny we got some help from Justice Kagan.

MS. RICE: That may remain to be seen. I think that it is also worth going a little bit into, back to the vote [78] dilution proof that's been proffered by the plaintiffs. When plaintiffs for the first time in their supplemental briefing attempt to put forward proof of

a *Gingles*-type analysis, they do so without the benefit of any expert testimony that is usually the subject of the *Gingles*-type analysis. Actually, Dr. McDonald disclaimed that he was doing the kind of analysis that he would normally do in a racial gerrymandering case, because the data was not available to him. He could not do an ecological inference study about the existence of cohesion voting or block voting.

The plaintiffs also get the law wrong when they talk about Cooper v. Harris. In that case the State was actually looking to Section 2 district as a justification for what was found to be a racial gerrymander. So the burdens were a little bit different than in your typical Section 2 case. There, the Supreme Court said that the past performance of that district showed the absence of block voting. And then they went on to find that the State had put on no evidence of the proposed district's performance. So here where we didn't have any evidence of the actual district as it performed, the crossover voting, the block voting, it's not enough to rely just on past election results by that same case.

I think it might be helpful to look at – I apologize – those election results that the plaintiffs did add in their supplemental briefing. Because what's [79] interesting here is in the precincts retained, so these are precincts that they purport to represent to you were in both the old 6th and the new 6th, there's a sharp drop off in Republican voting strength in the 2012 election. In other words, it's evidence that there's crossover voting between Republicans and the Democratic

congressional candidate, in this case John Delaney, in that election among the precincts that were retained.

You can also see that there's an increase in the precincts that were removed in Republican voting strength. And that makes sense because now those people are in the 8th District. So their choice would be either Representative Van Hollen or Representative Raskin, who were very different candidates from Congressman Delaney, in terms of their political ideology.

So these results, insofar as they can mean anything, don't even seem to, by their face, be what the plaintiffs said, because of those different candidates and different elections among these three groups.

We also again, don't have any information about exactly which plaintiffs are in which of those groups. The kind of information that seems to be called for by the Supreme Court's action in *Gill* and *Rucho* and that is the kind of information that – was present in *Rucho* when the Court there moved forward in that case.

[80] Also, with regard to the *Gingles* criteria the various threshold requirement, plaintiffs talk about the maps in 1991 and 2001 showing that there was a compact region of Republicans. But those maps are some of the only maps in the entire history of the 6th District that exclude Montgomery County, or in the more recent map extend the 6th District into the eastern part of the state. So they're not very good evidence that there's any compact concentration of Republicans in that area. We just don't have any of that

information, the general kinds of proper analyses that would accompany a *Gingles*-type proof.

Again, because we're talking about injunctive relief it's important to bear in mind that there have been other times when the Court has been asked to enter an injunction when there's only one election left. And in those cases, especially when there has been delay by the plaintiffs in bringing their claim, like there was in *White v. Daniel*, and there was in this case as acknowledged by the Supreme Court –

JUDGE NIEMEYER: Is that the role of a court to say we recognize you have suffered First Amendment injury, but just hold up, you can suffer that injury for another election and then we'll take care of you. That's really what that argument says, doesn't it?

MS. RICE: I think what the argument is saying –

JUDGE NIEMEYER: In other words, if there's one [81] election where they are going to sustain First Amendment injury, it seems to me that injury should be redressed if it is a First Amendment injury.

MS. RICE: I think what the Court in *White* was recognizing is that –

JUDGE NIEMEYER: I'm asking you as a general proposition.

MS. RICE: I think as a general proposition, either way, the Court might take into account the First Amendment burdens, burdens on other citizens not before this Court, that would accrue were there to be three successive congressional elections under three successive maps. If we're talking about associational injury we have the 2018, 2020, and 2022 elections that would be undertaken under different maps, different shape of the district –

JUDGE NIEMEYER: Let's make it a little more dicey how about if we have a racial, we find there was a severe racial redistricting and that the plaintiffs were racially diluted. And we say – you're asking us to say, well, there's only one more election, put up with it, we'll fix it in the next election –

MS. RICE: Judge Niemeyer, respectfully I don't think we have to make it more dicey because what we're talking about is invoking the powers of equity.

JUDGE NIEMEYER: I understand, but your argument is [82] because there's only one more election, we shouldn't enter injunctive relief. And my point is if there's a violation we should redress it. And there will be another – there will be another bill down the road, but – and of course, the outcome of this particular mapping, if we were to change it, would inform future maps and maybe get into something that doesn't raise the same constitutional violation.

But I have a little trouble diminishing or demeaning the First Amendment injury, if it is there. They've

demonstrated First Amendment injury, it seems to me they should be entitled to a remedy, even if it's only one more election out of five.

JUDGE BREDAR: And apart from that, are First Amendment associational injuries only inflicted on election day? Not just the election.

MS. RICE: Your Honor, but it would just not be – it would be not just the election for all other members of the public, not just those that are bringing these claims as well. The injunction standard requires this Court to look beyond the merits of the case and to find definitively on the other three prongs, and in doing that laches is a major component of equity. And that's what courts in the 4th Circuit have done in the past –

JUDGE NIEMEYER: Well, you've got a point, this thing really has dragged on, but it was filed in 2013, and [83] it's changed shape, it's been to the Supreme Court twice, there's been discovery, there have been motions. It has a procedural history that I think none of us should be proud of as persons in the 3rd branch, but that's a fact of life. It may affect the preliminary injunction, the Supreme Court pointed out that they waited three years I think after filing before seeking a preliminary injunction to stay. But the permanent injunction was asserted in 2013, and we still have an election cycle in front of us.

MS. RICE: In *White v. Daniel* the Court was considering a permanent injunction, looked at the equities, looked at the laches that had been displayed by the plaintiffs in this case, and also looked at the harm

to the public of successive and frequent redistricting, to find that the equities in that case did not favor entering an injunction for one remaining election.

We would submit that that's an instructive and persuasive case, especially given the procedural history here, the uncertainty of the constitutional claims issue, the novelty of those claims to the general assembly, there's no reason to believe that any election in 2022, any map would suffer from the same deficits. And in those cases permanent injunctive relief has been in the past withheld. And so we –

JUDGE NIEMEYER: So plaintiffs –

MS. RICE: We do think that's an appropriate [84] outcome –

JUDGE NIEMEYER: – so individual plaintiffs who suffer First Amendment rights [*sic*] have to be told we can't remedy your rights, because there are interests of other people who are going to be confused and are going to be having be effected [*sic*] with different maps.

MS. RICE: So –

JUDGE NIEMEYER: It doesn't quite make sense. It seems to me what you're saying are factors for exercising equity. But I was trying to load the facts up for you to find out how much equity you get. And I'm suggesting that hypothetically, if we find a violation of the Constitution, ongoing and existing, both in the next election and both in the organizational efforts within a

political party from now going forward, do we just ignore it? Don't we have an absolute duty to remedy it.

MS. RICE: In *Perry v. Judd*, which was another –

JUDGE NIEMEYER: Is that yes or no?

MS. RICE: I don't think that there is any affirmative duty one way or the other. I think that these are equitable factors that must be found in addition to the merits. So if –

JUDGE BREDAR: How can one reasonably even say in Maryland that voters are all that settled in the districts they are in, given the make – given the appearance of the [85] map? Half the people in the state probably don't even know what district they're in, because you can't look at a map and figure it out without a microscope. So, implicit in your argument is this notion of sort of regularity and the value of the status quo, but there's an argument to be made in contrast with that, that the situation itself in this – under the current map is so convoluted and susceptible of misunderstanding, the public is not well-served at all by it, in terms of just a fundamental understanding of their role and place in the Democratic process.

MS. RICE: The public will have been going to the same polling place, voting in the same set of elections for four successive elections at this point when they go to the polls again in November. So to the extent that redistricting always involves some shuffling of people, that it always involves some confusion, there –

maryland [*sic*] has taken the position that they will redistrict every ten years. And –

JUDGE NIEMEYER: And if somebody was hurt during each one of those elections by unconstitutional conduct, but we should not remedy it.

MS. RICE: It is certainly –

JUDGE NIEMEYER: Because it's been going on for four elections and, therefore, we just discount it.

MS. RICE: It is certainly the case that that is what has happened in other cases in the 4th Circuit in the [86] past, that courts have declined to give remedies to plaintiffs that have been dilatory in their pursuit of claims, even First Amendment claims, when elections are at issue, because of the great public interest in the regularity of elections.

It is not only that plaintiffs have brought this case late, too late, they have also failed to meet their burden of production. They have not given this court sufficient evidence of causation. They have not – which and maybe now is a good time to say a little bit about *Hartman v. Moore* and *Mt. Healthy*. I think there has been some confusion about what *Mt. Healthy* burden shifting relieves a plaintiff of, even if it were to apply. It's causation that it substitutes for.

So that burden shifting substitutes for showing of causation. But it's inappropriate to do that here. It can't substitute for intent or for harm, both of those things still need to be shown under *Mt. Healthy*. It just

relieves the party, the moving party, the plaintiffs of showing causation and instead flips the burden to show that the action was not caused by the intent to [*sic*] the State. And it should not be imposed here.

Lozman clarified that even further last term, by expressly analyzing the facts of that case and saying that the only reason that the Supreme Court would apply ***Mt. Healthy*** was because the facts in that case showed that there was no [87] distance between the decision maker and the retaliatory action, that the decision maker had, in fact, ordered the retaliatory action. In that case kicking Mr. Lozman out of a public council meeting. They said that if the facts were to develop in some other way that their analysis would not necessarily hold.

And it is that other way that we exactly have here, where we have an attenuated causal chain, where there are multiple potential causes and the plaintiffs have simply not given the Court enough aid in disentangling those for inferences to be made about causation. And in that case they have failed to meet their burden and summary judgment should be granted for the State on those grounds.

JUDGE NIEMEYER: Okay. Thank you. What I think we'll do, it's better to keep it together. How about if I give you each ten minutes on rebuttal, is that – can you handle that?

MR. KIMBERLY: That would be acceptable, Your Honor I wonder if I might ask for a restroom break before –

JUDGE NIEMEYER: Of course. Why don't we take a five minute break and then we'll allow each side short rebuttal. I'm not going to cut anybody off arbitrarily, because we do want to hear the views of the parties, but I think we're hearing the same thing from both sides again and again. So we'll take a five minute break then.

[88] (A recess was taken.)

JUDGE NIEMEYER: All right. Mr. Kimberly, I think we're going to start with a ten minute time. And I know down at the Court of Appeals we have little lights that come on, there's an orange light and then there's a red light, you get a ticket if you go through. But we'll start with that for both sides, since there are cross motions here. And if it turns out that something really productive and something new is working we can be a little flexible, but let's start out with a ten minute –

MR. KIMBERLY: I appreciate that, Your Honor. And I'll endeavor to be even shorter than that unless the Court has questions. I'd like to start just very quickly, a substantial amount of Ms. Rice's presentation concerned intent. I want just very briefly to rehabilitate a few points on that score. The first is that really the – there's no question that NCEC was at the heart of the redistricting here. So if you can – I'm sorry, I don't have my clicker. I'm sorry, just one moment.

(Video played.)

MR. KIMBERLY: And so it was clear that at least so far as the confessional [*sic*] map was concerned there was predominantly outsourcing to the congressional delegation. That was confirmed by former Secretary of State John Willis and also by sitting Senate President Mike Miller, Mike Miller [89] who said like I told you the map was drawn, it was primarily drawn by the congressional people.

Now Ms. Rice showed you a map that she said Eric Hawkins put before the commission and that map doesn't in any way resemble what actually was adopted. In fact, what the evidence shows is Mr. Hawkins drafted some dozen maps. And it was ultimately too [*sic*] broad blue prints that were put before the GRAC. There's the one that you see on the left is the one that Ms. Rice was talking about. And it's true, the GRAC did not proceed with that proposal. The second proposal is Congressional Proposal 2, which also is not precisely what was adopted, but you can see much more closely resembles the blueprint that was adopted.

So the GRAC, and really when I say the GRAC, I mean the staffers who were working on this project rejected Congressional Proposal 1, which coincidentally did not have as high EPI [*sic*] as the other one. And this is what we ended up with. This is the adopted map. You can see the close resemblance to the map that had been proposed by Eric Hawkins as one of the dozen or so maps that he drafted.

Ms. Rice also suggested that it was unnecessary – or excuse me, there were reasons that it was necessary

to fundamentally reshuffle the map in such a way that huge numbers of voters were going to have to be shuffled no matter what. Well, in fact, the only evidence that we have on this, [90] the testimonial evidence, suggests the exact opposite. This is Speaker of the House Michael Busch.

(Video played.)

MR. KIMBERLY: All right. Unless there are additional questions from the panel on the question about –

JUDGE NIEMEYER: Yes, I have one question, is it clear in the record as to the instructions given to Hawkins in drawing the map?

MR. KIMBERLY: The record is clear that Hawkins understood that his – and I can bring up slides if it would be helpful there – that his directive was to protect Democratic incumbents and otherwise to flip one of the two Republican districts.

JUDGE NIEMEYER: All right. Okay.

MR. KIMBERLY: And that's in his own testimony.

Your Honor, I'm sorry, if I may just very briefly, I meant just to move on. Just briefly to suggest there is no First Amendment right to infrequent redistricting. In fact, there's no reason to think that a state couldn't redistrict every election, that wouldn't be a First Amendment violation. So it's, I think, hard to square that reality with what Ms. Rice was suggesting about

frequent redistricting being a First Amendment burden on other voters.

And just a point of clarification concerning confusion and the like. Polling places don't change when [91] redistricting changes. And precincts, as a general matter, are fairly stable. They actually change from election to election, occasionally independent of redistricting because of changes in population. But they are relatively stable. So this kind of disruption that Ms. Rice suggested would follow from adopting a new map here I don't think actually holds up.

JUDGE BREDAR: What do you say also about the notion that associational harms don't occur only on election day, is there anything to that? That it isn't solely about the impact on how someone votes.

MR. KIMBERLY: I wouldn't disagree, Your Honor. I guess as you pointed out, so far as the Constitution is concerned, the question is not whether this effect happens, what makes it an unconstitutional burden is that it's coupled with the specific intent to impose it on a particular segment of the –

JUDGE NIEMEYER: I think the question was whether the harm –

JUDGE BREDAR: The burden.

JUDGE NIEMEYER: The burden caused by damage in the associational right is given effect only at an election, or does it continue on an ongoing basis.

MR. KIMBERLY: No, I think it continues on an ongoing basis.

[92] JUDGE NIEMEYER: That's because the organizational efforts of the parties.

MR. KIMBERLY: That's exactly right. That's exactly right. Thank you, Your Honors.

JUDGE NIEMEYER: All right. Ms. Rice.

MS. RICE: I will similarly keep this brief and very much related to Mr. Kimberly's presentation. Again, on intent, and this just shows why summary judgment can't be granted on this issue, this is – I apologize, I don't have the video, but this is Governor O'Malley's deposition. If you go here, Governor O'Malley –

JUDGE RUSSELL: Why don't you go ahead and use the ELMO and focus down on it – that particular portion. There you go.

MS. RICE: Talks about how Congressman Hoyer might have come in with a map to which he confessed nobody supported. So when you say I was given a map, I was given a map with the caveat that – that there's no consensus supporting the congressional delegation for this map.

So Governor O'Malley talks about and then the first declaration of Mr. Weissmann, which I didn't bring up with me, but it's Exhibit 11 to our motion for summary judgment, also discusses how there was only one map provided and how they didn't really use it

because they didn't think it had consensus and couldn't be used. More specifically, as to the [93] point about Congressional Option 1 and Congressional Option 2, the only evidence that Congressional Option 2 came from NCEC comes from a supplemental declaration of Dr. McDonald upon his examination of some computer files.

In our reply we attached the second declaration of Mr. Weissmann, who says that he does not recall receiving anything other than what was attached to his first declaration, that those file names that Dr. McDonald relied on were chosen by him to mark those draft maps as the two main options, and that he didn't use those names to explain that they were from the congressional delegation, but to merely denote that they were congressional maps as opposed to legislature maps, which he was simultaneously drawing the legislative maps, those redistricting processes happen simultaneously in Maryland. That's the continuation of that affidavit.

And relying again on Speaker Busch's lack of recall on this issue, which plaintiffs have done a number of times, just goes to show that laches was actually damaging to the pursuit of this case, that people's memories have faded, that they could not recall with specificity what had happened when they were deposed in 2017, their thoughts about this in 2011.

And there really are many examples of courts declining to disrupt elections. One of the most famous is *Reynolds v. Sims*, in that case the Court declined to

enter an [94] injunction even when it did find a pretty severe violation of constitutional rights. So that is typical in election law, that it is not just the rights of the plaintiffs before the Court, but the interests of the public in the elections.

As for whether precincts are redrawn, it really depends if those precinct boundaries need to shift because of the census and the redistricting process, the redistricting time that the State Board of Elections works in concert with the Department of Planning, but it's certainly possible that those precincts shift. Certainly, who is on the ballot would shift for many people.

So, with those points, unless the Court has further questions –

JUDGE NIEMEYER: Well, thank you very much. And thank both counsel not only for the arguments but for the papers and clear presentations of what this record is.

Is there anything further we need to take into account today? Otherwise, we'll take this under counsel and see if three judges can get together and decide something.

MS. RICE: Thank you, Your Honor.

JUDGE NIEMEYER: Okay. Will you please adjourn court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE, *et al.*,	*	
Defendants.	*	
	*	

* * * * * * *

CONSENT MOTION TO STAY

Defendants Linda H. Lamone and David J. McManus, Jr., respectfully move for a stay of the Court's November 7, 2018, final judgment (Dkt. 223) during the pendency of their appeal to the Supreme Court. Plaintiffs have authorized defendants to state that they conditionally consent to the relief requested in this motion and will file a separate statement respecting the motion.

A stay of this matter pending the defendants' appeal to the Supreme Court is warranted to avoid potentially contradictory results or needless expenditure of public resources. This Court's opinions and order set forth two different theories of First Amendment retaliation claims applied to the issue of partisan gerrymandering, one involving a vote dilution injury and one involving an injury to representational rights. This Court's opinion adds potentially two new justiciable claims for partisan gerrymandering to the multiple

claims recognized in *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 799 (M.D.N.C. 2018). The North Carolina defendants have appealed, *Robert A. Rucho, et al. v. Common Cause, et al.*, No. 18-422 (October 1, 2018). The Supreme Court is therefore poised to address the issue of partisan gerrymandering once again this term. Any further guidance from the Supreme Court will be important to ensure that, even if this Court's order is affirmed, state lawmakers do not redraw Maryland's electoral map for 2020 using a standard that is not the one ultimately adopted by the Supreme Court. Moreover, this Court's order may be reversed, either because the Supreme Court finds partisan gerrymandering to be nonjusticiable or because the Supreme Court approves a different test for partisan gerrymandering claims, which Maryland's map may or may not satisfy. As this Court's order is currently structured, the State must submit a map prior to the end of the current Supreme Court term. Proceeding in parallel with the pending appeal could require duplicate efforts or result in the waste of public resources if the 2011 map is ultimately upheld.

In support of this motion, the defendants make the following representations:

1. Defendants recognize that, if the Supreme Court affirms this Court's final judgment, there must be adequate time to draft and implement a new congressional map for use in Maryland's 2020 congressional elections. To meet that goal, the State Board of Elections must have a final, court-approved map completed and in-hand by or before October 18, 2019. It is

not necessary to have a map completed before that date.

2. The Supreme Court's current term is scheduled to conclude on June 24, 2019. If the Supreme Court affirms this Court's final judgment on or before that date, defendants represent that there will be adequate time to draft and implement a new congressional map by or before October 18, 2019, in time for use in Maryland's 2020 congressional elections.

3. To ensure that the Supreme Court is able to consider defendants' appeal on the merits this term, defendants agree to file their notice of appeal and jurisdictional statement by December 3, 2018. Counsel for plaintiffs have represented that they will file their motion to affirm by December 11, 2018. Defendants will file their reply on December 18, 2018, together with a letter pursuant to Supreme Court Rule 18.7 waiving the 14-day waiting period.

4. If the Supreme Court affirms this Court's final judgment, upon issuance of the Supreme Court's decision, defendants agree to begin immediately drafting a new map and simultaneously to negotiate in good faith with plaintiffs to reach a mutually agreed revised schedule for arriving at a new map, in the same form as the procedure established by the Court's final judgment. Defendants commit that in no event will plaintiffs have fewer than 15 days for the filing of their objections to the defendants' proposed plan, if any. Defendants also commit that there will be no fewer than 60 days for the Court-established Congressional

District Commission to develop its own plan, if that becomes necessary.

A proposed order is attached.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al. *Plaintiffs*, vs. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

PLAINTIFFS' STATEMENT OF CONDITIONAL CONSENT TO A DISCRETIONARY STAY PENDING APPEAL

Plaintiffs respectfully submit this statement to express and explain their conditional consent to the State's motion for a stay pending appeal.

As we have stressed repeatedly throughout our briefs, and as the Court stated in its final judgment, time is of the essence in this case. Plaintiffs agree as a general matter that, if the State appeals, the Supreme Court must be allowed to rule promptly. Yet ensuring a decision during the Supreme Court's current term will require expedited jurisdictional briefing. Failure to brief the appeal in time for resolution during the current term would risk disrupting this Court's established procedure for the adoption of a new map.

The State now moves for a stay of the Court's final judgment pending resolution of its appeal to the Supreme Court. Although plaintiffs do not believe that the State is entitled to a stay as of right under the

framework established in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), they conditionally consent to a discretionary stay in reliance on the representations and commitments described below.

First, the State has represented that if a new map is approved by the Court on or around October 18, 2019, there will be sufficient time for that map to be used in the 2020 congressional elections. Second, the State has represented that if the Supreme Court affirms this Court's final judgment on or before June 24, 2019, there will be adequate time to draft and obtain this Court's approval of a new map by the October 18, 2019 deadline. The State has also committed to working in good faith to reach a mutually agreeable modified schedule—and one that is acceptable to the Court—to achieve that goal.

To ensure that the Supreme Court has adequate time to hear the appeal during the October 2018 Term, the State has agreed to an expedited schedule for initial jurisdictional briefing. The expedited briefing schedule, which was negotiated and mutual [*sic*] agreed to by the parties, is set out in the State's motion. Abiding by the agreed schedule will ensure that there is adequate time for the Supreme Court either to summarily affirm or to note probable jurisdiction and rule on the merits of the State's appeal this term, sufficiently in advance of the 2020 election cycle.

The Court has authority to condition a discretionary stay of its final judgment on the State's pursuit of an expedited appeal. *See, e.g.*, Order 2, *Common Cause*

v. Rucho, No. 1:16-cv-1026 (M.D.N.C. Sept. 12, 2018) (Dkt. 155) (granting a discretionary stay of the final judgment pending appeal "subject to certain conditions," including an expedited briefing schedule before the Supreme Court); *United States v. Westchester Cty., New York*, 2016 WL 3566236, at *11 (S.D.N.Y. 2016) ("The County's application for a stay of this Order pending appeal is granted on the condition that it file its appeal promptly and seek expedited review."); *Florida v. United States HHS*, 780 F. Supp. 2d 1307, 1319 (N.D. Fla. 2011) (similar); *People for the Am. Way Found. v. United States Dep't of Educ.*, 518 F. Supp. 2d 174, 178-79 (D.D.C. 2007) (similar); *Ctr. For Int'l Evt'l Law v. Office of the U.S. Trade Rep.*, 240 F. Supp. 2d 21, 23-24 (D.D.C. 2003) (similar).

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, et al.,	*	
Plaintiffs,	*	
v.	*	**CIVIL NO. JKB-13-3233**
LINDA H. LAMONE, et al.,	*	
Defendants.	*	

* * * * * * *

ORDER

(Filed Nov. 16, 2018)

Now pending before this Three Judge Court is the Consent Motion to Stay (ECF No. 226). The Plaintiffs have docketed their Statement of Conditional Consent to a Discretionary Stay Pending Appeal (ECF No. 227).

Upon consideration of the Motion and Statement, the Motion is GRANTED IN PART. The Judgment (ECF No. 223) previously entered is STAYED until the United States Supreme Court decides the appeal of this case or until the passage of the date of July 1, 2019, whichever first occurs. Upon expiration of the stay, counsel shall jointly and immediately move to set in a status conference, during which this Court will set new deadlines to execute the previously entered Judgment (unless action of the Supreme Court supersedes proceedings in this Court).

So ORDERED this 16 day of November, 2018.

For the Three Judge Court:

/s/ James K. Bredar
Honorable James K. Bredar
Chief Judge